CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 184

A. N. CONE, PETITIONER,

vs.

WEST VIRGINIA PULP AND PAPER CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 13, 1946.

CERTIORARI GRANTED OCTOBER 14, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 184

A. N. CONE; PETITIONER,

vs.

WEST VIRGINIA PULP AND PAPER CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

	Original	Print
Proceedings in U.S.C.C.A., Fourth Circuit	A	1
Appendix to appellant's brief	A	1
Amended complaint	1	1
Excerpts from testimony of witnesses	3	2
Direct examination of A. N. Cone	3	2
Cross-examination of A. N. Cone	14	11
Redirect examination of A. N. Cone	21, 27	20
Recross-examination of A. N. Cone	25, 27	20
Portion of the direct examination of John D. Harrison	28	21
Direct examination of George Cooley	28	21
Cross-examination of George Cooley	31	23
Redirect examination of George Cooley	35	26
Recross-examination of George Cooley	36	26
Direct examination of Owen Cone	36	26
Cross-examination of Owen Cone	40	30
Portion of direct examination of Hill B. Beach	42	31
Direct examination of Howell Bivens	47	35
Portion of the direct examination of F. C. Hills	50	37
Direct examination of Tom Peeples	52	38
Motion to dismiss	56	41
Order refusing the motion	56	41
Defendant's motion to strike certain testimony	57	42
Order overruling the motion	57	42
Defendant's motion to strike certain evidence	57	42
Order refusing motion	58	42
Defendant's motion for directed verdict	58	42
Remarks by the Court	58	43

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DEC. 12, 1946.

—8053

Appendix to appellant's brief—Continued

	Original	Print
Completion of defendant's motion for directed verdict	59	43
Order refusing motion	60	44
Charge to jury	60	44
Exhibits	70	51
Plaintiff's exhibit P-A.—Deed of Caroline F. Cone to A. N. Cone	70	51
Plaintiff's exhibit P-B.—Plat	73	54
Plaintiff's exhibit P-D.—Certificate of auditor	74	55
Defendant's exhibit D-1.—Map showing land of estate of Martha H. Perry and others	77	56
Defendant's exhibit D-2.—Deed of J. Lamb Perry to West Virginia Pulp and Paper Co.	78	57
Defendant's exhibit D-3.—Deed of Mary Joseph Waring to J. Lamb Perry	82	59
Defendant's exhibit D-4.—Deed from James Tupper to Mary S. and Josephine M. Waring	85	61
Defendant's exhibit D-5.—Deed from Elias B. Scott to Joseph Ioor Waring	89	64
Defendant's exhibit D-6.—Deed from Mary S. Waring and Mary Joseph Waring to John Cone	93	66
Defendant's exhibit D-13.—Deed of Adam Miles Cone to Miles Cone	97	68
Defendant's exhibit D-14.—Report of James Tupper, Master in case of Perry v. Perry	101	72
Defendant's exhibit D-15.—Decree in case of Perry v. Perry	103	73
Judgment	104	74
Notice of motion for new trial	105	74
Affidavit of Charles W. Waring	107	76
Exhibit A.—Mortgage from Miles Cone to J. H. Cone	114	81
Exhibit B.—Deed from Miles Cone to Owen C. Cone	120	85
Exhibit C.—Deed from Caroline F. Cone to Andrew N. Cone	123	87
Exhibit D.—Deed from Caroline F. Cone to J. M. Cone	126	88
Exhibit E.—Deed from Rivers N. Tumblestone to Mrs. C. F. Cone	129	90
Exhibit F.—Deed from Annie L. Tumblestone to R. N. Tumblestone and Mrs. C. F. Cone	132	92
Exhibit G.—Deed from Noel Tumblestone to Mrs. C. F. Cone	134	94
Exhibit H.—Deed from Ida Matilda Viard to Mrs. C. F. Cone	138	96
Exhibit I.—Deed from Charles H. Tumblestone to Mrs. C. F. Cone	141	98
Exhibit J.—Certificate of auditor	144	100
Opinion and order refusing motion for new trial	146	101
Notice of appeal	151	105

	Original	Print
Appendix to appellee's brief	155	105
Excerpts from testimony of witnesses	155	105
Direct examination of John D. Harrison	155	105
Cross-examination of John D. Harrison	157	107
Direct examination of Robert Williams	157	108
Direct examination of Frank Green	158	109
Direct examination of Julia Anne Driggers	159	110
Cross-examination of Julia Anne Driggers	159	111
Direct examination of H. H. Jessen	159	110
Cross-examination of H. H. Jessen	161	112
Direct examination of Wesley M. Cone	161	112
Cross-examination of Wesley M. Cone	161	112
Cross-examination of John Harvey Cone	161	112
Recross-examination of John Harvey Cone	162	113
Cross-examination of Hill B. Beach	162	113
Cross-examination of Howell Bivens	163	114
Cross-examination of Tom Peeples	164	115
Direct examination of Russell E. Haynes	165	117
Cross-examination of Russell E. Haynes	171	123
Redirect examination of Russell E. Haynes	175	127
Recross-examination of Russell E. Haynes	175	127
Ruling on auditor's certificate	175	127
Certificate of Auditor	177	129
Plaintiff's exhibits O-P-E. Check of H. H. Jessen to West Virginia Pulp and Paper Co.	179	132
Affidavit in reply to notice of motion for new trial	180	133
Minute entries	187	138
Opinion, Dobie, C. J.	189	139
Judgment	203	149
Petition for rehearing [omitted in printing]	204	149
Order denying rehearing	215	150
Stipulation as to record on petition for certiorari [omitted in printing]	216	150
Clerk's certificate [omitted in printing]	217	150
Order allowing certiorari	218	150
Stipulation as to record	219	151

[a]

APPENDIX TO APPELLANT'S BRIEF

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT

No. 5442

WEST VIRGINIA PULP & PAPER COMPANY, APPELLANT,

VERSUS

A. N. CONE, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, AT CHARLESTON.

[Stamp;] Filed Dec. 15, 1945, Claude M. Dean, Clerk.

[fol. 1] AMENDED COMPLAINT—Filed November 1, 1944

The Plaintiff above named, complaining of the Defendant above named, would respectfully show this honorable court:

1. That the Plaintiff is a citizen of the State of South Carolina, and is informed and believes that the Defendant is a corporation organized and existing under the laws of one of the States of the United States, and owns real estate in Colleton County, South Carolinia, operates a business in Colleton County, South Carolina, and maintains agents and servants, residents in Colleton County, South Carolina,

2. That the Plaintiff is the owner of a certain tract of land situate, lying and being in Dorchester County, State of South Carolina, adjoining lands of the Defendant. Said tract of land being more particularly described by deed of Caroline F. Cone to A. N. Cone, dated 16th August, 1920, and recorded in the office of the Clerk of Court of Dorchester County the 18th September, 1920, in Book 35 at page 288, as follows:

> All that certain lot, part, parcel or tract of land situated, lying and being in Burns Township, Dorchester County in the State aforesaid containing One

Hundred six and one-half (106½) acres, more or less. Bounded as follows, viz: North by lands of J. Lamb Perry, East by lands said to be owned by Burton Lumber Company, formerly Sarah Cone, South by lands of F. Goodwine, formerly Sarah Cone, and West by lands of M. C. Cone. All of above description more fully appears when reference is had to plat [fol. 2] of property hereby conveyed, made by Jas. A. Postell, Surveyor, dated August 16th A. D. 1920.

And has been in quiet, peaceable and exclusive possession of the same for more than twenty (20) years.

3. That the Plaintiff is informed and believes that the Defendant, its Agents and Servants, entered upon the said tract of land during the month of September, 1941, without Plaintiff's knowledge or consent, cut and destroyed a large quantity of timber on the said tract of land, and manufactured the same into lumber or sold same to be manufactured into lumber and removed the same from the said premises.

4. That the Plaintiff has never given the Defendant, its Agents or Servants, or anyone under whom it claims any permission or authority to enter upon the said land or to cut or to take therefrom any timber of any kind, but has ever since the fact came to his knowledge forbidden and used every reasonable means to have the Defendant desist from the trespasses above set forth; that the boundary lines of the said tract of land are well defined and marked, having been laid out by the Plaintiff, his Agents and Servants, and by former owners, more than twenty (20) years and acted upon and acquiesced in by them and all subsequent owners up to the time of the trespasses herein alleged, which facts were well known to the Defendant, its Agents and Servants, at the time the said trespasses were committed herein alleged; that the said acts and trespasses were wilful, wanton and outrageous and in disregard of the Plaintiff's rights.

[fol. 3] 5. That by reason of the acts and trespasses above set out the Plaintiff has been damaged in the sum of Twenty-five Thousand and no/100 Dollars ($25,000.00).

Wherefore, Plaintiff prays for judgment against the Defendant in the amount of Twenty-five Thousand and

no/100 ($25,000.00), and for the costs and expenses of this action.

Jeffries, McLeod & Unger, Attorneys for Plaintiff.
By H. Wayne Unger.

Walterboro, South Carolina, 27th October 1944.

EXCERPTS FROM TESTIMONY OF WITNESSES

Direct-examination of A. N. Cone.

By Mr. Unger:

Q. You are Mr. Ansell (Andrew) N. Cone, plaintiff in this case?
A. Yes, sir.
Q. Where do you reside.
A. At Ravenel.
Q. What is your occupation?
A. Farming.
Q. Do you own the tract of land described in the complaint which has been just read?
A. Yes, sir.
Q. From whom did you acquire this tract of land?
[fol. 4] A. From my mother.
Q. What was her name?
A. Caroline F. Cone.
Q. I hand you a deed, which is already in evidence of Caroline F. Cone to A. N. Cone, is that the deed under which you acquired the property?
A. Yes, sir.
Q. When did you acquire it?
A. In 1920.
Q. Did you have it surveyed?
A. Yes, sir.

The Court: That deed is not in evidence.

Mr. Waring: Your Honor, I understood a certified copy was to be put in.

The Court: That is the original deed, a certified copy is not necessary if they have the original, either the original or a certified copy.

Mr. Unger: (Offers exhibit)—Plaintiff offers in evi-

dence deed, Marked Pltfs. Ex.-A. (Ex. P-A) dated the 16th of Aug. 1920, deed of Caroline F. Cone to A. N. Cone, recorded the 18th of September, Book 35, page 288.

The Court: This deed was actually left in the custody of the clerk, it was put in evidence but it was put in the custody of the clerk and was to be admitted without formal proof.

Mr. Waring: I am sorry, perhaps I misunderstood.

Q. You had the land surveyed, Mr. Cone?

A. Yes, sir.

Q. Were you given a plat of the land after it was surveyed?

A. Yes, that is it, that is the plat.

[fol. 5] The Court: What is the date of the plat?

A. August 16, 1920.

Q. By whom was it surveyed?

A. J. A. Postell.

Q. When did you enter into possession of this tract of land?

A. That was in 1920.

Q. State whether or not you have listed the same for taxes?

A. Oh, yes, sir. I paid taxes on it from 1920 on down—1921 was the first taxes I paid on it.

Q. Have you ever actually entered on the land since the deed?

A. I have hunted on it, got wood on it, got clapboards, covering for out barns and houses, two and three-foot boards.

The Court: How did he get them, did he cut down trees?

A. I cut some lying down and sawed them up and stood them up.

Exhibit: Plat of J. A. Postell marked in evidence as plaintiff's Exhibit, Ex. P-B.

Q. Trees that were fallen trees. Can you tell approximately when you did these acts?

A. 1923 and 1925.

Q. From whom did your mother secure this property, if you know?

A. From my daddy.

Q. Do you know about when?
A. It was along about 1917.
Q. Do you have a deed from your father to your mother?
[fol. 6] A. Do I have a deed from my father to my mother?
Q. Yes?
A. No, I haven't got that deed.
Q. Do you know what became of it?

Objection by Mr. Waring: I don't think that is competent.

The Court: I will have to sustain the objection.

Q. Was your mother in possession of this property?
A. Yes.
Q. How long was she in possession of it?
A. From 1917 to 1920.
Q. From 1917 to 1921; was your father in possession of this property prior to 1917?
A. Yes, sir.
Q. For how long?

Objection by Mr. Waring: That is not competent, your Honor.

The Court: If he can connect the title from the father to the mother, he hasn't done it yet, I will direct that the testimony be stricken out if not connected.

Mr. Waring: This is all verbal, your Honor.

The Court: Subject to it being connected up with the present owners, that will be all right.

Mr. Unger: We are showing a transfer of possession from his father to his mother.

The Court: No, you are showing possession.

Q. Your father was in possession of this land prior to your mother?
A. Yes, sir.
Q. Approximately how long?
A. How long my father was in possession?
Q. Yes?
[fol. 7] A. That has been since about 1888.
Q. Do you know from whom your father got the property?
A. From whom my father got it?

Q. Yes?

A. He got it from his father.

Q. Your father got the property from your grandfather?

Q. By the Court (After Mr. Waring says, "This is not proper"): Mr. Cone, did he get it by deed?

A. Yes, sir.

The Court: Produce the deed.

The Court: It would be competent testimony if you have a deed.

Mr. Unger: This is a certified copy from the Clerk of the Court.

The Court: What?

A. It is a deed from A. Miles Cone to Miles Cone.

The Court: The deed is dated December 19, 1888.

Objection by Mr. Waring: I object to the introduction of that deed in evidence because I point out that the description in that deed has no relation to the property at issue in this action and is not the property involved in this action.

The Court: I don't know whether it is or not and you can't put in evidence on all things at one time. I will admit it subject to it being connected up with the property. It goes in subject to it being connected.

Exhibit: Deed from A. Miles Cone to Miles Cone dated December, 1888, marked Ex. P-C.

Q. (Reading from Ex. No. P-C) "Know all men by these presents, that I, Adam Miles Cone,"

[fol. 8] Was your grandfather Adam Miles Cone?

A. Yes, sir.

Q. (Reading on) "of St. Paul Parish, Colleton County, in the State aforesaid, Farmer, in consideration of the Sum of Three Hundred Dollars to me paid by Miles Cone"

What was your father's name?

A. Miles Cone.

Q. (Reading on) "in the State aforesaid, Farmer, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said Miles Cone all of that piece or parcel of land situate in St. Paul's Parish, County and State aforesaid, containing Two Hundred and Forty-eight acres, more or less,

and bounded on North by A. S. J. Perry, South by Est. of Jennings Perry. On the West by Franklin Cone and on the East by John Cone, formerly known as the Josiah Perry Estate Tract."

Are you familiar with that tract?

A. Yes, sir.

Q. State whether or not the one hundred six acres tract in controversy is a part of this tract?

Objection by Mr. Waring: We object to that.

The Court: He wasn't there when that was made.

Mr. Unger: He is familiar with the tract, it was his father's, he is testifying.

The Court: Do you know where the land described in that deed was?

A. Yes, sir.

The Court: How do you know?

A. Well, I have been on it and around it and saw it.

The Court: You are familiar with those boundaries?

[fol. 9] A. Yes, sir.

The Court: Q. Those are the same boundaries as the same tract now claimed by you?

A. Yes, sir.

The Court: He says it is the same tract and I will admit the testimony.

Mr. Waring: I object, your Honor, and ask an exception.

The Court: Exception noted.

Q. State whether or not the 106 acres is a part of this tract?

A. It is separate from that tract.

Q. Is it a part of this tract of land or not?

A. A part of the 248 acres.

Q. This tract of land is bounded on the North by A. S. J. Perry, on the South by Jennings Perry, on the West by Franklin Cone and on the East by John Cone. Do you know where Franklin Cone's land was?

The Court: He asked if the tract you are suing about today is a part of the 248 acres of land or not?

A. I think it is separate there, isn't it? The 248 acres is separate.

The Court: He wants to know if the part sued about today is part of the 248 acres or not, do you know?

A. It is a part of it.

Q. Who owns what is remaining of this tract now?

A. My brother.

Q. What is your brother's name?

A. Owen Cone.

Q. Have you ever been over this piece of land, the 106 acres?

A. Yes, sir.

[fol. 10] Q. Have you ever seen any markers in this?

A. No, sir.

Q. You never examined any markers?

A. No.

Q. Have you ever been over this with your father?

A. Yes, sir.

Q. What acts have you exercised with your father there in his lifetime?

A. Well, I just,—I cut wood and board and hunted on it during my father's lifetime.

Q. During his lifetime did he ever exercise any act of possession over this land?

Objection by Mr. Waring: I object.

Q. Were you present with him?

A. Yes, sir.

Q. What acts of possession did he exercise in your presence?

A. Well, he helped me get out ply-boards together.

Q. What other acts?

A. Well, he hunted on it and got wood.

Q. What kind of land is this, are there any cultivated fields on it?

A. No, sir, it is all swamp lands, timber land.

Q. Is there any settlement on it?

A. No, sir.

Q. Has there been any settlement to your knowledge?

A. Not to my knowledge.

Q. Are there any natural boundaries of this 106 acres, any streams running?

A. A canal running.

Q. On what side?

A. On the North side.

[fol. 11] Q. On the North side of this piece of land is a canal?

A. Yes, sir.

Q. How about on the West side?

A. On the West there is a little bank.

Q. A little bank on the West, how about on the East side?

A. Well, there is a fence used to be there, it is down now, on the East on the John Cone land, on the South side of that, South and East.

Q. Do you know who formerly owned the lands surrounding,—who bound the land on the East?

A. That was John Cone, Uncle John.

Q. Who later owned it, what relation was he to you?

A. My uncle.

Q. Do you know any subsequent owners after John Cone on the East?

A. Burton Lumber Company.

Q. Did Wesley Cone ever own it?

A. Yes, sir.

Q. Who now owns it on the East?

A. West Virginia Pulp and Paper Company.

Q. Who formerly owned the land on the North of this?

A. J. Lamb Perry.

Q. Who now owns it?

A. West Virginia Pulp & Paper Company.

Q. Who formerly owned on the South of this?

A. On the South, that was John Cone, too.

Q. And later who owned it?

A. Later, Sarah Cone.

Q. Who, do you know anybody else who owned it on the South?

[fol. 12] A. Jim Cone.

Q. And who else?

A. Fred D. Goodwine.

Q. Who now owns it?

A. West Virginia Pulp and Paper Company.

Q. They owned the land on three sides of this tract?

A. True.

Q. Who owns on the West side?

A. My brother on the West.

Q. Have you ever given the West Virginia Pulp &

Paper Company any permission to cut any timber on this land?

A. No, sir.

Q. Have they cut any timber on this land?

Objection by Mr. Waring: I object, your Honor.

The Court: If he knows of his own knowledge he can testify.

A. I went there and saw them cut it. I saw them cutting.

The Court: Whom did you see cutting the timber?

A. I saw some white men and a darky hauling logs out of the swamp, I saw them sawing, edging the logs and loading them on a truck.

Q. Did you talk to any of them?

A. I did.

Q. Do you know for whom they worked?

A. They were supposed to be working for Mr. Cooley.

Q. Did you talk with the man who was measuring the logs?

A. No, sir, my lawyer did. I didn't talk with him.

Q. Approximately how many men did you see on this land cutting the timber?

[fol. 13] A. About 10.

Q. Were there any mules in there?

A. Mules was hauling the logs out.

Q. About how many.

A. I saw some three or four carts coming out.

Q. When was this you saw the timber being cut?

A. Along about the latter part of September or the first of October, 1941.

Q. Do you know about how long there was cutting in there?

A. I don't know how long they stayed in there.

Q. Did you take any steps to stop them?

A. I turned it all over to my lawyer.

Q. You turned it over to your lawyer to stop it?

A. Yes, sir.

Q. Mr. Cone, has anyone ever claimed that piece of land outside of yourself, to your knowledge?

Objection by Mr. Waring: That is taking in a lot of territory.

Q. To your knowledge, Mr. Cone?

A. The Court: Well, he claims it, what do you mean?

Q. Has anyone had any controversy about the possession of this land?

A. No, sir.

Q. Has anyone ever opposed your possession?

A. No, sir.

Q. Did anyone ever oppose possession of your mother to this land?

A. No, sir.

Q. Or of your father to this land?

A. No, sir.

[fol. 14] Q. As I understand it, your testimony is that in your opinion this deed to your father from your grandfather is this—was a part of the tract of land that your grandfather deeded to your father under that deed, is that correct?

A. Yes, sir.

Q. Do you know whether or not your grandfather had any possession of this land?

A. I don't know whether he did or not.

Q. Was there any familiar information about this tract of land in your grandfather? State whether or not it was familiar knowledge that this was part of your grandfather's land?

A. Yes.

Objection by Mr. Waring: Let him state how he knows.

The Court: That is very vague, did your father ever tell you anything about this piece of land?

A. He said it was grandfather's.

Q. How much damage was done to the timber on this property?

A. Twenty-five Thousand ($25,000.00) Dollars.

Cross-examination of A. N. Cone.

By Mr. Waring:

Q. You say Twenty-five Thousand ($25,000.00) Dollars was the damage done, it couldn't have been Twenty-four Thousand Nine Hundred and Ninety-nine ($24,999.00) Dollars? Could it?

A. Well, I put $25,000.00.

[fol. 15] Q. Why do you say $25,000.00, how do you get that figure?

A. The way the timber is cut, the timber is torn up.

Q. Do you know how much timber is cut?

A. Not exactly.

Q. Do you know the value of it?

A. No.

Q. Then you can't say how much damage was done, can you, that is just a guess you are making, isn't it?

A. Well, excepting what the timber is worth, so much a thousand, stumpage.

Q. You don't know how much was taken, you are just making a guess as to the figure, aren't you, isn't that true? You don't know it was $25,000.00?

A. What do you want me to answer?

The Court: Get the answer down, do you know what timber was worth and what its value was and why you claim $25,000.00 damages?

A. I judge it to be that, I never estimated it. I am no timber estimater.

Q. How do you know $25,000.00 of damage was done, suppose you state that?

A. Well, I don't know just about how much, I just guess it at about how much the damages were.

Q. You have no method of arriving at that figure, have you?

A. I don't.

Q. Mr. Cone, is your mother living?

A. No, sir.

Q. When did she die?

A. She died in 1924.

Q. Is your father living?

[fol. 16] A. No, sir.

Q. When did he die?

A. He died in 1941.

Q. You say you went over this particular property you are talking about with your father?

A. Yes, sir.

Q. Now, did you ever build a fence on it?

A. No, sir, I never built no fence.

Q. You never plowed it, it wasn't cultivated?

A. No, sir, it was timber land.

Q. How often did you go on it, you say you have been on it, how often?

A. I was raised right close on it,, I have hunted upon it all my life and got out clapboards and got out wood.

Q. When was the last time you have been on it?

A. A couple of years, I reckon.

Q. Did you go on it?

A. Since it has been in dispute I went on it. I went to the land corners and——

Q. Did you walk it pretty thoroughly at that time?

A. No, I didn't walk it.

Q. You couldn't know how much was taken off?

A. I walked it before it was cut.

Q. When was that?

A. That was 1923 and 1925 and all through there. Right on through there.

Q. You haven't been on it since?

A. Yes, sir.

Q. When was the last time after 1923?

A. I went practically every year.

Q. You just went on it during hunting season?

[fol. 17] A. Yes, sir.

Q. The rest of the year you didn't go on it?

A. I would be busy, I didn't have time.

Q. You live some distance from there?

A. Yes, sir.

Q. When you were hunting you would go on it pretty thoroughly, this particular tract of land?

A. Yes, sir.

Q. Have you been on it in the last 10 years?

A. Yes, sir.

Q. You have been hunting over there in the last 10 years?

A. Oh, yes, sir; it is a good place to kill turkeys.

Q. When you go over there you do go over a pretty good part?

A. I go over all of it.

Q. You are familiar with the fire lines on it?

A. No, sir.

Q. You have never seen a fire line and posters put on there saying "No Trespass"? "No Trespassers"?

A. I never saw none.

Q. Have you put any on it?

A. No, I didn't. My father never did post none of his property.

Q. You are familiar with this dam that runs between the lines of your father and this property, isn't there a dam?

A. A canal dam runs East and West, a canal dam.

Q. I am thinking of one, a dam or bank running North and South?

A. Yes.

Q. Isn't there one that runs along?

[fol. 18] A. Yes, a bank runs North and South.

Q. And your father had the lands just West of that, didn't he?

A. Yes, he owned land just West of it.

Q. And there is a very distinct bank along there dividing that property?

A. Yes, sir.

Q. Isn't there a fire line that runs just East of that bank?

A. I never saw it, if it was.

Q. You have never seen it?

A. It was thick woods in there and logs and tree tops, you couldn't hardly see.

Q. Did you ever see the fire lines?

A. Yes, they run to the corner every year, a six-acre field that belonged to my uncle, they run that every year, they didn't go on this 106 acres, they just come to the corner and stopped and turn and go back. Every year they run them.

Q. You are sure you know where this property is?

A. Yes, sir.

Q. And you have never seen the fire lines on this property?

A. I never did see it.

Q. If others were to say so they must be mistaken because you never have seen it?

A. If any was there I never saw it.

Q. The time this property was being cut by Mr. Cooley, I believe you said, did you complain to anyone about the cutting?

A. Well, I just didn't complain to anybody; only my lawyer.

[fol. 19] Q. Who was your lawyer?

A. Lawyer Ackerman at that time.

Q. Did he do anything about it?

A. He said he would take care of it. He was going to St. George the next day and he would look into it and see about it.

Q. Nothing was done?

A. No, sir, not by him. I got into a wreck and liked to have got killed. I never could get him to do nothing, so I employed Mr. Unger, of the firm of Jefferies, McLeod and Unger, after Mr. Ackerman.

Q. And all during this period from, I think you said 1920, when you got the deed from your mother

A. Yes, sir.

Q. Up to the present time you would go on it, from time to time, but other than that you didn't do anything else but just hunt on it occasionally?

A. No.

Q. And during the time of this cutting, when it was going on you weren't doing anything with the property at all, were you?

A. I wasn't doing nothing with it?

Q. You weren't farming it?

A. No, you couldn't farm it.

Q. You weren't living on it?

A. No, sir.

Q. You didn't have a fence around it?

A. No, sir.

Q. You didn't have it posted?

A. No, sir. My father never did post his own.

Q. You didn't have it posted?

A. No, sir.

[fol. 20] Q. You weren't going on it except occasionally during hunting season, is that correct?

A. After I moved away from there I didn't do nothing.

Q. During this time it was being cut and just prior to that?

A. No, sir.

Q. Did you testify you were born near this property? Did I understand you to say that?

A. Born where?

Q. Nearby where this property is.

A. Yes, sir, right close.

Q. Isn't the house in which your father lived probably,

where you were born, just a short distance West of this bank?

A. Yes, sir.

Q. It runs along the Western border?

A. Yes, sir.

Q. When did you move away from there?

A. I moved from there in 1912, around to Delmas.

Q. You have been living there since then?

A. No, but I did go back to my father's, not so far from there, Delmas' crossroads.

Q. How long have you been living there?

A. From 1912 to 1923.

Q. And then where did you go?

A. To Ravenel.

Q. And you are living at Ravenel now?

A. Yes, sir.

Q. Since 1923 you have been living at Ravenel?

A. Yes, sir.

Q. That is in Charleston County?

[fol. 21] A. Yes, sir.

Q. How far is that from this property?

A. I reckon 15 miles. I used to go up and camp a week at the time and hunt and get wood and camp and hunt a week at the time.

Redirect-examination of A. N. Cone.

By Mr. Unger:

Q. Mr. Cone, you employed someone to go over this land and estimate the timber that was cut?

A. Yes, sir.

Q. You employed competent timber estimators, have you not?

A. Yes, sir.

Q. And you have talked to them?

A. Yes, sir.

Q. So you are not entirely guessing at how much timber was cut?

A. No, sir, I am not guessing. I will let them testify. I am no timber estimator; I can saw it up and you put it on the scale.

Q. When is the last time you were on this 106 acres since this dispute?

A. The last time?

Q. Yes, sir.

A. You know we were on it when we were estimating it there.

Q. Do you know about when that was?

A. A couple of months ago, wasn't it, I reckon it was two months ago.

[fol. 22] Q. What was the condition of your health at that time?

A. Bad. It is still bad.

Q. Were you able to go through the property?

A. No, sir, the doctor told me not to go through it. So I got these estimators. I got them to go and I stayed out at the corner.

Q. At this time I would like to introduce the tax certificates of the auditor.

Exhibit: We had an agreement the auditor's certificate would be sufficient. There is a jump from 1915 to 1921. It was admitted the auditor's certificate should be admitted as the reflection of the entries on the auditor's books. The plaintiff desires to introduce the auditor's certificate.

Objection by Waring: I object to this being introduced in that I object to the statements in (2) which do not indicate they reflect or have anything to do with this land. I didn't agree there should be an introduction of tax payments with regard to any other land.

The Court: I don't see where that is competent.

Mr. Unger: It is all in the chain of title. I understood in the pre-trial conference there was no need to bring in the auditor to prove any of this.

The Court: You have a tract in the name of Miles Cone, 385 acres.

Mr. Unger: He testified his father owned all of that.

Objection by Mr. Waring: No, he didn't and at this time I object and move all this be stricken out, it hasn't been proved.

The Court: I will admit that as a record of what the auditor's record shows. I will admit this one as to [fol. 23] the Cone Tract, 106 acres, and the rest of it, at this time subject to the later part of it being connected up.

Objection by Mr. Waring: I object to the introduction of the latter part as having no relevancy to this case.

The Court: Objection overruled, note an exception. Now, as to this other one, it is in Burns School District.

According to the records they changed the number, according to the auditor, School District 11 and School District 22 were the same. I will reserve my ruling on that.

Mr. Waring: We object on the ground it is irrelevant.

The Court: The first I admit; the second one I withhold because I don't see what it has to do with it. Maybe I can be shown.

Mr. Waring: This is a certificate by the County Auditor and I also note in the far column the notation "Paid." I have never seen that notation, I don't understand it.

The Court: If the County Auditor put it there, under his signature, I don't know how it got on the County Auditor's Books, but if he put it there you have agreed his certificate should reflect his books. You can argue to the jury if you wish to.

Exhibit: Auditor's Certificate, marked Exhibit No. P-D—May 14, 1945. This certificate shows 1944, Burns School District 22, A. N. Cone, 106½ acres, Paid. Is that the tract of land in controversy?

A. Yes, sir.

Q. It shows in 1943, 1942, 1941, 1940 on down to 1932— [fol. 24] Burns School District 22, the same return was made. In 1931 the certificate shows "Burns School District—Formerly No. 11 now No. 22, 106½ acres, Paid. Was there a change in the school districts?

A. Yes, sir.

Q. Prior to 1931 if was School District No. 11?

A. Yes, sir.

Q. And then the certificate shows 1929 on down to 1921, School District No. 11, A. N. Cone, 106½ acres. Is this listing the land in controversy?

A. Yes, sir.

Q. It shows in 1915, in Burns School District No. 11 that Miles Cone returned 385 acres of land. Was that Miles Cone your father?

A. Yes, sir.

Q. Do you know how many acres of land he owned in this School District?

A. I just go by what it says there, 385 acres.

Q. Was that all in one body.

A. Yes, sir.

Q. In 1916 it shows Burns School District No. 11, Miles Cone, 385 acres; and in 1917 Burns School District No. 11, Miles Cone 320 acres; and in 1918, 1919 and 1920, 320 acres. It dropped from 385 acres to 320 acres. It shows in 1917, Burns School District No. 11, Mrs. C. F. Cone, 55 acres. Do you know who she was?

A. She was my mother.

Q. In 1917, 1918, 1919 and 1920, Mrs. C. F. Cone, Burns School District No. 11, 55 acres in 1917, 50 acres in the remaining years; did your mother own any land in this School District other than this tract?

A. No, sir.

Q. In 1920 the certificate shows Mrs. C. F. Cone no [fol. 25] property, no real estate. When was this property deeded you by your mother?

A. In August, 1920.

Q. And you returned it in 1921?

A. Yes, sir.

Q. The other certificate is reserved. Does the West Virginia Pulp & Paper Co., own any land in Burns School District?

A. Yes, sir.

Q. How many sides of your tract?

A. On how many sides of this 106 acres?

Q. Yes, sir.

A. On three sides.

Q. Did Mr. J. Lamb Perry own any land adjoining this land?

A. On the North of this.

Q. Do you know what was the last year he owned any land on there?

A. I really don't. I think he sold out about 1923. I think that is the last time.

Q. Did your brother, I believe you said your brother, Owen, now owns the balance of your father's property joining this on the East.

A. Yes, sir.

Q. Has he ever made any claim to this 106 acres?

A. No, sir.

Recross-examination of A. N. Cone.

By Mr. Waring:

Q. Your mother in 1910 had a tract of 50 acres [fol. 26] from Charles H. Tumbleston?

A. I believe she had some land from Tumbleston, too.

Q. That has nothing to do with this property we are talking about?

A. No.

Q. In 1907 she got some from Ida Matilda Viard?

A. In when?

Q. In 1907.

A. I really don't know.

Q. She had other property that had nothing to do with this property at all?

A. No, sir.

Q. She returned for taxation, that was returned for taxation, she paid taxes on it? Now, this property which she conveyed to you by deed, she hadn't gotten any title from anyone else had she?

A. No, sir. No, I never question her as to what she had.

Q. You just got her to give you a deed?

A. I never questioned her as to her rights.

Q. You didn't know where she had gotten it, or where from, you just got her to give you a deed so that you could put it on the record?

A. The only thing she gave me the land.

Q. You wanted to get it on the record, you had a deed, that is why you got a deed from her?

A. Yes, sir.

Q. You pursuaded her to give you that deed?

A. No, sir.

Q. Did she say one day, "I want to give you some property?"

A. Yes, sir.

[fol. 27] Q. Anyhow you arranged between you, she should give you this deed and you put it on record, that was 1920 and as far as you know she had no title, you didn't know where she got it?

A. I didn't question her rights as to where she got it.

Q. You didn't know anything at all about it, before that.

Redirect-examination of A. N. Cone.

By Mr. Unger:

Q. What School District was this other land of your mother?

A. That was District No. 11; that was way up.

Q. State whether the name of that School District was "Collins"?

A. Yes, sir.

Q. Did that adjoin Burns School District?

A. Yes, sir.

Q. Did you ever ask your mother where is the deed to the property father gave you?

A. No, sir.

Recross-examination of A. N. Cone.

By Mr. Waring:

Q. They were all in School District 11?

A. They were all in No. 11 and later No. 22.

Q. They were all in No. 11?

A. And No. 13.

[fol. 28] Portion of the Direct Examination of John D. Harrison

Q. Did Mr. Miles Cone, in your presence, ever make any statements concerning the ownership of this 106 acres?

A. Yes, he said Mr. A. N. Cone owned it.

Objection by Mr. Waring: I object, that is hearsay.

The Court: I will let him say. Objection overruled. Exception noted.

Direct-examination of George Cooley.

By Mr. Unger:

Q. Where is your residence, Mr. Cooley?

A. Summerville.

Q. Were you president of the Carolina Logging Corporation in 1941?

A. I was.

Q. Is that company still in existence?

A. No, sir.

Q. What is your occupation?

A. I am a lumberman, and timber operator.

Q. How many years have you been engaged in such a business?

A. In South Carolina for 20 years.

Q. In 1941 state whether or not you cut any timber on 106 acres of land in Burns Township.

A. Yes, sir.

Q. For whom did you cut that timber?

[fol. 29] A. The Carolina Logging Corporation cut it and we cut it on a cutting contract with the West Virginia Pulp & Paper Co.

Q. Do you have a copy of that cutting contract?

A. Yes, sir.

Q. This is a duplicate of the agreement, your duplicate copy of the agreement?

A. Yes, sir.

Q. With the permission of counsel we are going to use a carbon copy which is being submitted in evidence by defendant's attorney.

The Court: Is there any objection—is there any question as to execution—do you wish the original?

Mr. Waring: No, your Honor, we have the original.

The Court: You are offering it in evidence now?

Mr. Unger: Yes, your Honor.

Exhibit: Plaintiff offers in evidence, as Exhibit No. P-F, cutting contract with the West Virginia Pulp & Paper Co.

Q. What is the date of that contract?

A. September 18, 1941.

Q. Is that Plat annexed to this contract the land that you cut?

A. It is.

Q. Do you know how long the operations continued on this cutting?

A. It was a sixty (60) day contract and my recollection is that it was finished up in that time.

Q. You were cutting for sixty (60) days?

A. Yes, sir.

Q. This title is lands of former J. Lamb Perry and Blackburn Hughes, do you have any recollection of how [fol. 30] much timber was cut off?

A. I do not.

Q. As president of the corporation those records were in your charge?

A. Yes, sir.

Q. What has become of them?

A. They were either lost or else filed so well I could not find them when I looked for them the other day.

Q. At that time you were employed under this contract by West Virginia Pulp & Paper Co.

Objection by Mr. Waring: He didn't say that.
The Court: The paper speaks for itself.

Q. Were any of the agents of the West Virginia Pulp & Paper Co., on this land under this cutting contract?
A. Yes, it was necessary, under the cutting, that an agent be there.
Q. Who measured the timber?
A. They did.
Q. How did you know what timber you were to cut, and how much you had cut?
A. Their agent scaled it.
Q. Would they send you a report?
A. Yes, sir.
Q. To whom did you pay for this timber?
A. West Virginia Pulp & Paper Co.
Q. Mr. Cooley, as a matter of fact the West Virginia Pulp & Paper Company's agent marked this 106-acre tract off, did they not?
A. Yes, sir.
Q. Did you go on the land during the cutting?
[fol. 31] A: Yes, sir.
Q. They have a yellow X-mark they put on the trees?
A. It was well marked, yes, sir.
Q. Would you say there was at least one million feet of timber cut off there?

The Court: That isn't a proper question; if he doesn't know, let him say he doesn't know.

Q. This contract provides, Mr. Cooley, that you were to cut 300,000 feet of timber every two weeks, is that correct?
A. That is correct.
Q. (Reading from contract) "Payment for the timber cut, as herein provided, shall be based on the measurement of the First Party," that is the West Virginia Pulp & Paper Company?
A. Yes, sir.

Cross-examination of George Cooley.

By Mr. Waring:

Q. Mr. Cooley, you said that the Carolina Logging Corporation cut this timber in September, 1941?

A. That is right; that is when they started.

Q. And you did that under a sale to the Carolina Logging Company by the West Virginia Pulp & Paper Company?

A. Yes, sir, that is right.

Q. When you went there in September, 1941, the agents of the West Virginia Pulp & Paper Company were in charge of the property?

A. They were.

[fol. 32] Q. And they were around there when you were there during the cutting, while the Carolina Logging Company did the cutting?

A. Yes.

Q. And they directed what was to be cut, is that correct?

A. They did.

Q. So that they were exercising possession at that time, were they not?

A. Very much so.

Q. Now, during September, 1941, did the West Virginia Pulp & Paper Company cut any of that timber?

A. No, sir.

Q. The only cutting that was done was done by the Carolina Logging Corporation?

A. That is right.

Q. And the Carolina Logging Corporation, did it manufacture it into lumber?

A. No, sir.

Q. They sold it for manufacture into lumber?

A. Yes, sir, they sold it to other people.

Q. And the Carolina Logging Corp. was the one that cut and removed that timber?

A. They did.

Q. At this same time, Mr. Cooley, were you cutting other timber on other lands of the West Virginia Pulp & Paper Co.?

A. I was. I had quite a number of cutting contracts with the West Virginia Pulp & Paper Company and

there was a contract, it was in the nature of a sub-contract on this Perry-Hughes timber, under which I bought the hardwood timber and another party had [fol. 33] bought both pine and hardwood, and I cut this hardwood portion of it on this sub-contract on the West Virginia Pulp & Paper Company.

Q. That was on the Lamb-Perry Tract?

A. I knew it as Perry-Hughes, the tract just North of this.

Q. I think, Mr. Cooley, there was a plat attached.

The Court: Is that plat supposed to go in?

Mr. Waring: It does have a plat.

Mr. Unger: I want the plat attached to the exhibit as a part of the copy.

Mr. Brockinton: Let the original stay in then.

The Court: Mark the original in evidence and cancel it on this copy.

Q. There is a plat attached to that contract, is there not?

A. Yes, sir.

Q. 106 acres?

A. Yes, sir.

Q. Would you look at this plat and see whether you can identify the same property on that plat (referring to plat—exhibit No. D-1) for identification?

A. This portion here is quite obviously marked "part of Waring."

Q. And that is the same as the tract referred to on the small plat, is it not?

A. Yes, I am sure that it is. This is the highway running through here.

Q. Mr. Cooley, referring to this large composite plat, whatever you would like to call it, can you tell from that where there is a canal in relation to that property?

A. It is marked on there. This Northern line, that [fol. 34] canal, that starts off of the property to the Northeast and runs across the end of this and on West for about the equal distance as across the end of the property.

Q. Does the canal run along the Northern boundary of what is indicated here as "W. N. Cone" property?

A. It does.

Q. And across the property marked "Part of Waring," which is in dispute, and continues on along the Northern boundary of lands of "Miles Cone"? And that is the same canal?

A. That is one of the boundaries of this property, yes, sir.

Q. I refer you to the Western boundary, identified as "Part of Waring," do you know what that Western boundary is?

A. A bank along this line.

Q. Do you know if there are any fire lines?

A. Yes, sir, there is a fire line on the inside of that bank.

Q. And there was at the time?

The Court: The "inside" means East or West side?

A. On the east side.

Q. You mean within the area of the disputed property?

A. Yes, sir.

Q. There is a fire line?

A. Yes, sir.

Q. And there was at the time this cutting was in progress.

A. Yes, and it had been there some time.

Q. Did you notice any posting there, whether it was posted?

[fol. 35] A. Yes, sir, it was posted; West Virginia Pulp & Paper Company had their signs on the lines of that area.

Redirect-examination of George Cooley.

By Mr. Unger:

Q. What kind of timber was it; had it been cut over before?

A. No, sir.

Q. It was virgin timber?

A. It was original growth pine, mixed with hardwoods and some cypress.

Q. Many poles?

A. Yes, sir, quite a few cypress poles were taken off that land, yes, sir.

Q. Were there any cleared areas on it at all?

A. No, sir.

Q. It was all heavily timbered?
A. Yes, sir.
Q. Now, Mr. Waring has referred you to a composite plat here on which you have identified this small tract as "part of Waring"—that lies to the South of the canal?
A. Yes, sir.
Q. And the Waring tract is to the North of that canal?
A. Yes, sir.
Q. The Waring tract, 868 acres on this plat, is that correct?
A. That is right.
[fol. 36] Q. Do you know what township this is in?
A. No, sir.
Q. You don't know anything about the ownership of this 106 acres?
A. The ownership?
Q. Yes?
A. The West Virginia Pulp & Paper Company, I hope.

Recross-examination of George Cooley:

By Mr. Waring:

Q. You have every reason to believe it is theirs?
A. I certainly do, yes, sir.
Q. Refer again to "Composite Plat" of what is marked "Waring" (referring to Exhibit D-1, for identification). The area referred to here as the "Waring tract" would include this as a part of it, would it not?
A. Yes, sir, that is right.

Direct-examination of Owen Cone.

By Mr. Unger:

Q. Mr. Cone, what relation are you to Mr. A. N. Cone?
A. Brother.
Q. Where do you live?
[fol. 37] A. Cottageville.
Q. Are you also a son of Miles Cone?
A. Yes, sir.
Q. At present, state whether or not at present, you own the estate of Miles Cone, the estate lands?
A. What estate I own of his?
Q. What part of the estate do you own?

A. I own the old homestead or all the land he had left after this was deeded to my mother.

Q. How much land is there left, how many acres?

A. 320 acres, I think, was the homestead.

Q. Are you familiar with this 106-acre tract?

A. Yes, sir.

Q. Do you have any knowledge of any possession your father had of this land prior to his death?

A. Yes, sir.

Q. Do you have any knowledge of possession that your mother may have had to this land?

A. Not only he deeded it to her.

Q. When?

A. About 1917.

Objection by Mr. Waring: Your Honor, we object to this testimony, too.

The Court: He says it was a written deed, you said he deeded it to her; did you ever see the deed?

A. No, sir, I didn't ever see the deed.

Q. Was there any family talk about the matter?

Objection by Mr. Waring: I object to that, your Honor.

The Court: The deed is the best evidence; produce the deed.

Q. What kind of timber was this, on this land?

[fol. 38] A. It was good timber on it, pine timber and hardwood timber and all. It was the original growth.

Q. Julia Anne Driggers lives on your place; you join this tract on the East?

A. Right.

Q. Did you have occasion to go across this property at anytime recently?

A. Not recently, I haven't.

Q. About a month or so ago?

A. About a month or so ago I went over it.

Q. You went over this land; did you see any landmarks in there?

A. Yes, sir, there were cross-marks on the trees, yellow marks.

Q. I hand you a plat here, marked Exhibit No. P-B of 106 acres, where were those marks just turn so the jury could see, where were the cross-marks on the trees that you saw?

A. All the way around, all along the canal, dam, they went down to the other dam and went on across.

Q. Around all four sides of it?

A. Yes, sir.

Q. Did you see any posts in the canal at the corner of your lands and the Perry lands?

A. Yes, sir.

Q. Did you see any lightwood knot and cypress witness, as shown on this plat?

A. Yes, sir.

Q. Is there a bank along this line?

A. Yes, sir, that is on the South side.

Q. That would be the East.

A. I meant to say the East side, yes, sir, there is an [fol. 39] embankment along there.

Q. Did you find a large pine tree here as shown on this plat?

A. Yes, sir.

Q. Did you find the lightwood knot on the bank here, as shown on this plat?

A. Yes, sir.

Q. Did you find a line oak here, as shown here, a stake on the end of the bank?

A. Yes, sir.

Q. Is that live oak—I guess that is a live oak—do you know, Mr. Cone, from your knowledge, in your lifetime, where the John Cone line was?

A. Yes, sir.

Q. Where was John Cone's property, where did it come to?

A. I joined mine a little on the Southeast.

Q. Do you know where it is in relation to this 106 acres?

A. No, sir.

Q. Is this 106 acres, was it ever a part of the John Cone or Sarah Cone property?

A. No, sir.

Q. Do you claim any interest in this 106 acres?

A. No, sir.

Q. Do you know any other land, in Burns School District, your mother owned outside of this 106 acres?

A. No, sir.

[fol. 40] Cross-examination of Owen Cone.

By Mr. Waring:

Q. Mr. Cone, referring again to this plat, which is Exhibit No. P-B, there is a bank here on the West side of this property, is there not?

A. Yes, sir, a bank here.

Q. And that divides it from what was formerly Miles Cone's property, your father's property, now your property?

A. Yes, sir.

Q. There is a bank along here?

A. Yes, sir.

Q. And just near the bank there is a fire line, is there not?

A. I never saw the fire line.

Q. Have you been on this property recently?

A. I was on it about one month ago.

Q. You didn't see it, you wouldn't say there wasn't one?

A. No, I wouldn't say there wasn't one.

Q. There may be?

A. There may be.

Q. Now, just South of this property was the property known as Sarah Cone, was it not?

A. That is right, South of this disputed property.

Q. And Sarah Cone was the widow of John Cone.

A. Right.

Q. And he was your uncle?

A. That is right.

Q. So that the property just below it, sometime was owned by your Aunt Sarah, by marriage?

[fol. 41] A. Yes, South of mine.

Q. South of the disputed property, you mean?

A. Yes, sir.

Q. And Southwest of your property?

A. Yes, sir.

Q. It does border your property, doesn't it?

A. A little corner, yes, some of her's borders mine.

Q. Now, Mr. Cone, you say you have 320 acres, that the tract you have is 320 acres that you got from your father?

A. Yes.

Q. And he had, of course, just that same quantity of property before you, did he not, did he deed it to you?

A. Yes, sir, he deeded it to me.
Q. That was all he had in that area?
A. At that time, that was all he had.
Q. That is all in Burns Township that he had?
A. No, sir.
Q. Did he have some more?
A. He owned out East of mine that he deeded to my mother. He turned it over to my mother.
Q. In any event, Mr. Cone, what I intended to ask you was this, in 1917 do you know whether that was School District No. 11, Burns School District No. 11?
A. I am most sure it was.
Q. And also the disputed property was in Burns School District No. 11?
A. I think it was No. 11.
Q. In 1917, 1918, 1919 and 1920, is that correct?
A. Yes, sir.
Q. Mr. Cone, when did your mother die, what year, do you remember?
[fol. 42] A. In 1924.
Q. And when did your father die?
A. In 1941.
Q. And it was before your father's death that he deeded you this property, it wasn't left to you, it was deeded to you?
A. In fact, I bought out the share of the other boys.
Q. Prior to your father's death you bought out their shares?
A. Yes, sir.

Portion of Direct Examination of Hill B. Beach

By Mr. Waring:

Q. Where do you live?
A. Walterboro, Colleton County.
Q. By whom are you employed?
A. At present?
Q. Yes.
A. The Health Department of Colleton County.
Q. And how long have you been so employed?
A. With this Department?
Q. Yes.
A. Oh, just three or four months.
Q. And before that by whom were you employed?

A. At the Naval Air Station, Beaufort, S. C.

Q. Before that by whom were you employed?

A. I was over at James Island Civil Air Patrol Base over there.

Q. And prior to that time?

[fol. 43] A. West Virginia Pulp & Paper Company.

Q. When did you leave the employ of the West Virginia Pulp & Paper Company?

A. In March, 1942.

Q. When did you begin work with them?

A. February 1st of 1926.

Q. February 1, 1926, to March, 1942, you were with them?

A. Yes, sir.

Q. You were in the employ of West Virginia Pulp & Paper Company?

A. Yes, sir.

Q. What were your duties, generally.

A. Well, superintendent of the woodland for them.

Q. In what area?

A. Charleston and Dorchester Counties, and the East portion of Charleston and Dorchester.

Q. Mr. Beach, have you heard the testimony in regard to the disputed area in this action?

A. Yes, sir.

Q. Did that land come within your supervision, did it come under your supervision?

A. Yes, sir.

Q Did the so-called Perry lands, Perry-Hughes lands, come under your supervision?

A. That is what I knew it as, Perry-Hughes.

Q. Do you recollect this 106 acres you know that property?

A. Yes, sir.

Q. Can you identify it on a plat (handing witness a plat) this is Exhibit No. D-1.

A. Have you got a blue print, I believe I could see [fol. 44] it better than I could on this one here.

Q. (Giving witness a blue print, copy of Ex. No. D-1.)

A. There it is.

Q. Would you identify that to the jury?

The Court: How is it marked?

Q. Describe how it is marked on the plat?

A. There is the disputed area there, it is marked with a bank on this side, and this side, and this side.

Q. How is it described on the plat?

A. How do you mean, sir?

Q. What is it named on the plat?

A. This particular plat, the Perry tract.

Q. On the plat what is it called?

Mr. Unger Objects: He answered what it was, he said it was the "Perry tract."

Q. I ask him to put his finger on the particular tract of land and if there are any words there to read them?

A. There is the particular tract.

Q. What is the marking on that, what does it say?

A. I can't see that so well, sir. "Part of Waring."

Q. Would you describe the marks on the ground around there that you know of?

A. Well, now I never have, I never did pay much attention to the marks on that side.

Q. That is on the East side?

A. This here was once the Cone, the Sarah Cone tract owned by Fred Goodwine and I noticed the markings on there but on this side, over here, I never did notice any markings over there only on this dam here, and on the Sarah Cone tracts.

Q. Did you notice any markings on the West side of the disputed property?

[fol. 45] A. Yes.

Q. On the West side of the disputed property, do you recollect anything on that side?

A. There was a mark and a dam coming through there.

Q. Now, Mr. Beach, during the time that you had charge of this property, would you tell me—first I will ask you was the property ever fenced while you had charge of it?

A. No, sir.

Q. Was it cultivated?

A. No, sir.

Q. What did you do what did your supervision consist of with the property?

A. Well, it consisted of trying to protect it against forest fires and poachers.

Q. Just to ride it generally and see what condition was there and see if anyone was poaching on it?

A. Yes, sir.

Q. Did you ever find any poachers on it?

A. No, sir, not to my knowledge.

Q. Did you ever see Mr. Andrew Cone on that property?

A. No, sir, not to my knowledge, I never did see him.

Q. You frequently went there?

A. Well, yes, sir.

Q. And from 1924 to 1942.

A. (Interrupting) From 1926.

Q. From 1926 to 1942 you never saw Mr. Andrew Cone on the property?

A. No, sir, I don't recollect ever seeing him on there.

Q. Did he ever tell you it was his property?

[fol. 46] A. No, sir.

Q. Did he ever assert ownership in any way as far as you know?

A. Not that I know of.

Q. Do you recollect, Mr. Beach, whether that property was posted by West Virginia Pulp & Paper Co.?

A. It was, yes, sir.

Q. Did you see to that?

A. Yes, sir.

Q. And when did you have it posted?

A. Well, it was posted when I went to the company in 1926.

Q. And your company had it posted when you first took charge?

A. Yes, sir.

Q. And you kept that posting up?

A. Yes, sir, very often we re-posted it.

Q. Did you ever exercise any other ownership or use in the property for the company?

A. Well, only protecting it against forest fires.

Q. What did you do for that?

A. There was a fire line put around it.

Q. A fire line?

A. A fire line, you might call it.

Q. Now, Mr. Beach, would you show on that map where your line, where you ran your fire line in relation to the Perry properties?

A. Well,

Q. I will ask you this question first, what is your practice in running fire lines?

A. You mean, to make the use of those lines we run them on the boundary line of the properties.

[fol. 47] The Court: Ask him what he does to make a fire line.

A. We clear the boundary line between the properties and plow that with a tractor and plow and then we go over on the property about 100 feet and clear it and plow it out and we burn in between those plowed lines.

Q. You have an area about 100 feet wide?

A. Yes, sir.

Q. Looking at the map will you show approximately where a fire line was run with regard to the Perry properties?

A. It was cut pretty well over the boundary line between Mr. Cone's property and other properties in the vicinity. This line here was plowed, it was cleared off up to Mr. Miles Cone here and on around his property.

Direct-examination of Howell Bivens.

By Mr. Waring:

Q. Mr. Bivens, where are you now employed?

A. Charleston Navy Yard.

Q. Where did you formerly work?

A. With the West Virginia Pulp & Paper Company.

Q. How long did you work with them?

A. I started in 1925 and worked to 1943.

Q. During that time did you ever have occasion to supervise the Perry-Hughes property for the company?

A. I have been on the property several times.

Q. You are familiar with the property?

A. Yes, sir.

[fol. 48] Q. Could you show on this plat, come before the jury (witness comes in front of the jury-box) please, the disputed property in this case?

A. Yes, sir, there it is right there.

Q. During the time that you supervised or had charge in any respect of this property did you ever see Andrew Cone on that property?

A. I never did.

Q. Did you ever hear of him making any claim to that property?

A. No, sir.

Q. Did he ever do anything on the property to indicate he owned it?

A. Not to my knowings.
Q. Did he build any fence?
A. Not that I saw.
Q. Did he clear any fields?
A. No, sir.
Q. Did he cut any timber?
A. No, sir.
Q. You went frequently on the property?
A. No, sir, I didn't go very often, whenever we had a forest fire I would go down in there and fight the fire.
Q. When you went with the company in 1925 did you have the property under your personal charge?
A. Right.
Q. And it was so until Mr. Beach took over?
A. And then I helped Mr. Beach if he had a forest fire on it why me and him took care of it together.
Q. Now, Mr. Bivens, do you recollect any fire lines being run on that property?
A. Yes, sir, there was a fire line, the CC boys cut that.
[fol. 49] Q. When was it put there?
A. I don't just exactly know when it was put there—I couldn't tell you.
Q. Show where that line is in relation to the map?
A. It is on that, coming down that bank next between Cone and the disputed property, called the disputed property, right there, I think the fire line is there around Cone.
Q. Between Cone and the disputed property. Come and show these other gentlemen where you cut it.
A. (Pointing) right there.
Q. Between what property is that bank running on the map?
A. Between Miles Cone.
Q. And what is the disputed property called?
A. "Part of Waring."
Q. And the bank runs between those two that you refer to?
A. Yes, sir.
Q. And where did the fire line run?
A. Right down that bank.
Q. Which side of the bank?
A. On the West side.
Q. The West side of the bank?
A. Well, it is on that side of the bank, that is the line,

it would be on the outside of the line, see what I mean, it would be on the East side.

Q. It would be on the East side of the bank?

A. Yes, sir.

Q. Will you show these gentlemen here which side of the bank the fire line ran?

A. That is the bank right there, it would be here.

[fol. 50] Q. Between what property?

A. Between Miles Cone and the Waring tract, "Part of Waring."

Q. South of that disputed property what property lies?

A. Cone.

Q. What is it called, do you know?

A. S. E. Cone.

Q. When this fire line was run do you know whether or not that property was owned by the company?

A. The Waring property?

Q. No, the S. E. Cone?

A. I don't recall that.

Portion of the Direct Examination of F. C. Hills.

By Mr. Waring:

Q. Mr. Hills, what is your business—what business are you in?

A. I am a timber cruiser and buyer for a lumber company.

Q. And how are you employed now?

A. I am employed as a timber cruiser and buyer.

Q. By whom?

A. Flat Inch Lumber Co., at Ridgeville.

Q. By whom were you employed in 1941?

A. Carolina Logging Corporation, in 1941.

Q. Did you take any part in the cutting which occurred September, 1941, on this disputed property?

A. Yes, I was cutting down there. I was in charge [fol. 51], of the cutting down there.

Q. This company of which Mr. Cooley was the head? Mr. Cooley testified here, he spoke of it as his company, was that right?

A. That is right.

Q. Step down to the jury. Can you identify on this plat the disputed property (using Ex. No. D-1)?

A. That is it right there, "Part of Waring."

Q. Were you at the same time doing any other cutting on the Perry lands?

A. No.

Q. You were superintending only the cutting on this, that is all you had charge of?

A. Yes.

Q. Do you recollect any fire lines that existed there at the time?

A. Yes, sir, there was a fire line down just inside of this West bank.

Q. And what property is named on the other side of that bank?

A. It was known as Cone Property, I don't know what Cone, I only knew it as Cone property.

Q. Do you recollect if the property was posted?

A. Yes, it was posted along this bank and along this line here, the South and West line were posted.

Q. By whom?

A. West Virginia Pulp & Paper Company.

Q. Now, when you were on that, when you went on that property, when you went on that property to do your cutting, who was in charge of the property?

A. (Thinking) You mean in reference to the cutting or——

[fol. 52] Q. You said you were in charge of the cutting, who was in charge of the property?

A. The nearest wood rider to it was Tommy Bivens, about a mile or two across the woods and he came by right often.

Q. He was a wood rider for who?

A. West Virginia Pulp & Paper Co.

Q. He came there frequently?

A. Yes, sir.

Q. Do you know from what company the Carolina Logging Corporation purchased this timber?

A. From the West Virginia Pulp & Paper Co.

Q. And this cutting was done under your supervision on behalf of the Carolina Logging Corporation?

A. Right.

Direct-examination of Tom Peeples.

By Mr. Waring:

Q. What is your name?
A. Tom Peeples.
Q. By whom are you employed?
A. West Virginia Pulp & Paper Co.
Q. You are now employed by them?
A. Yes, sir.
Q. How long have you been in their employ?
A. About eight (8) years.
Q. What do you do, Mr. Peeples, what are your duties?
A. I am caretaker for West Virginia Pulp & Paper Co.
[fol. 53] Q. You are caretaker of their lands?
A. Yes, sir.
Q. Now, you have heard the testimony about this disputed land, is that part of the land you look after?
A. Yes, sir.
Q. You look after the Perry lands, down there?
A. Yes, sir.
Q. You live nearby?
A. Yes.
Q. You know where that disputed land is on this map?
A. I believe I do, yes, sir.
Q. I wonder if you could point it out to the jury?
A. (Pointing on map.)
Q. Right there, what is it marked on the map, what is it called on the map?
A. Perry-Hughes.
Q. No, the disputed part, what is it called on the map?
A. Perry-Hughes.
Q. You know it on the ground?
A. Yes, sir, I do.
Q. Do you know when—were you with the company in September, 1941?
A. Yes, sir.
Q. You were around, were you around this property at this time?
A. Yes, sir.
Q. Do you remember any cutting going on on the disputed land?
A. Yes, sir.
Q. And who was cutting that timber?

A. Mr. George Cooley and Mr. Hills were out there, sir.

[fol. 54] Q. Mr. Hills was director there?

A. Yes, sir.

Q. You saw him there? Now, Mr. Peeples, how often do you go around this property?

A. I would say once a week, an average.

Q. Very frequently?

A. Yes, sir.

Q. What generally are you supposed to do?

A. Look out for hunters, sir, and see that nobody don't take anything off the lands.

Q. Anything else?

A. I believe that would be all.

Q. And what about fire?

A. Look out for fire.

Q. Do you help with the fire lines?

A. Yes, sir.

Q. Do you know whether or not a fire line is on this disputed property?

A. Yes, sir, it goes right down an old dam.

Q. The dam between what property?

A. Between Cone and West Virginia.

Q. Right along a dam?

A. Yes, sir.

Q. Do you ever remember during the 8 years you have been around there, Andrew Cone coming on that property?

A. No, sir.

Q. Have you ever seen him on it?

A. No, sir.

Q. Have you ever seen him around it?

A. No, sir.

Q. Has he any plowed fields on that property?

[fol. 55] A. No, sir.

Q. Has he ever built any fences?

A. No, sir

Q. Are there any fences?

A. No, sir.

Q. Is there any house on it?

A. No, sir.

Q. Have you ever seen him gathering wood on it?

A. No, sir.

Q. Or anything else around that property?

A. No, sir.

Q. Do you know what Cone that is, that this bank is by, what Cone is that?

A. What Cone the bank boundaries? Miles Cone used to own it and I think Mr. Rufus Cone, I think—I can point him out.

Q. Point him out.

A. (Pointing in the courtroom) That gentleman right back there, I think he owns the Miles Cone place.

Q. Which one?

A. The gentleman with the dark suit on, sitting side of Mr. Dan Cone.

Q. Stand up.

A. (The wrong man stands up) No, sir, the gentleman on the end, I think he owns the Miles Cone property.

Q. That one?

A. Yes, sir.

The Court: He is the one who testified yesterday?

A. Yes, sir.

Q. He is the one who now owns the property you are talking about?

A. The Miles Cone property, not the disputed property. [fol. 56] Q. That is the property that lines alongside this bank you spoke of, where the fireline is run?

A. Yes, sir.

DEFENDANT'S MOTION TO DISMISS

Mr. Waring: If it pleases your Honor, at this time the defendant wishes to make a motion.

The Court: Let the jury go to their room (the jury retires). Your motion is for a direction of verdict?

Mr. Waring: It is a motion to dismiss, under rule 41-B, voluntary dismissal. We move to dismiss on three different grounds:

1. The plaintiff has failed to prove that he has title to the property.

2. The plaintiff has failed to prove that he had possession of the property at the time of the alleged trespass.

3. That the plaintiff has failed to prove that the defendant, in September, 1941, cut, removed and sold the timber alleged to have been cut.

COURT'S RULING ON MOTION TO DISMISS

The Court: (After argument) Doesn't Mr. Cooley testify the West Virginia Pulp & Paper Company took him there and told him there is where he can cut. Suppose I took Mr. Cooley down to your house and point him out to your house and point out your dining room furniture and tell him take it out and sell it—do you think that shows him in possession of it?

[fol. 57] I don't think the plaintiff has put up very strong possession testimony but he said he had been on and off the property for a great many years.

(After further argument by Mr. Waring on the three grounds.)

I shall refuse the motion.

DEFENDANT'S MOTION TO STRIKE

I would like to move to strike all of the testimony pertaining to the back title. I will refer to it as that, for convenience, in that there has been no linking up by the plaintiff with the deed, I believe it was from A. Miles Cone to Miles Cone.

THE COURT'S RULING ON MOTION TO STRIKE

The Court: I think that is a matter for the jury to pass on. I don't think there is much evidence of title here but I will let the jury pass on it. Motion overruled. Exception allowed.

DEFENDANT'S MOTION TO STRIKE

I also move to strike out all evidence of any title or semblance of title, prior to Caroline Cone, going into this record.

[fol. 58] THE COURT'S RULING ON MOTION TO STRIKE

The Court: Motion also refused. Exception is noted and allowed.

MOTION BY DEFENDANT FOR DIRECTION OF VERDICT

Motion by Mr. Waring: (Jury out) If your Honor please, our motion is for a direction of verdict on the ground that there can be but one reasonable conclusion

from the evidence and that is that the judgment should be for the defendant. The motion is based somewhat on the same argument that was presented to your Honor on the motion to dismiss. The proof deduced by the defendant, we feel substantiates title conclusively in this land in the defendant and not in the plaintiff, as he attempted to show.

REMARKS BY THE COURT

The Court: (After argument) The fact that your outline of the testimony is good jury argument, and I confess that I have seen not very strong evidence of possession, but there is testimony that that was the property of Mr. Cone; they have put in evidence deeds, they have put in evidence some testimony as to the lines, and plaintiff, himself, says he frequently went on there. Whether you believe him or not that is not for me to pass on.

[fol. 59] Mr. Waring: He put in the deed from Caroline Cone to himself.

The Court: And he said he went on there and cut some boards, and hunted, and he had other testimony there of other people that said it was his land. (After argument by Mr. Waring as to showing of possession of this property in September, 1941.)

He doesn't have to show possession that month. Suppose he had proven he was there in June or July, the West Va. Pulp & Paper Company shows it had very slight possession, its own riders said they would go in there very infrequently. We know, it is true, none of the lands like this are occupied from day to day. I suppose that land went six months without anybody walking across it. They went in there, the plaintiff says the West Va. Pulp & Paper Company went in there without a right. You can't make an illegal entry and then say you are in possession. That is his argument, he says it is an illegal entry. That is his argument, I don't say that.

COMPLETION OF DEFENDANT'S MOTION FOR DIRECTION OF VERDICT

Mr. Waring: The other part of the motion then is just as it was made yesterday, that there has been no showing

that the West Va. Pulp & Paper Company did any cutting on this property. As I stated to your Honor yesterday it was stated by all of the witnesses, who testified, theirs and ours, that the cutting was done by the Carolina Logging Corporation, and the cutting, removing, and selling was all done by that corporation. [fol. 60] The West Va. Pulp & Paper Company had absolutely nothing to do with it. And there is no allegation in the complaint which would sustain a recovery against West Va. Pulp & Paper Company on the basis of the evidence given, because there has been no element of proof offered to sustain the proposition that West Va. Pulp & Paper Company cut, removed, or destroyed anything on the property.

COURT'S RULING ON MOTION FOR DIRECTION OF VERDICT

The Court: I passed on the proposition yesterday. If I was wrong yesterday I am wrong today. I think this is a jury question. I am not going to discuss how strong or how weak it may be, it is not necessary for me to do that. It is an issue of fact. Motion refused. I assume Mr. Waring notes an exception.

CHARGE TO JURY

Mr. Foreman and gentlemen of the jury, we now come to the final stage of this cause, the most important one, the decision by the jury. In our American courts, in the controversy of this case the plaintiff or claimant files what he calls his complaint. In this case it is an amended complaint. The first complaint didn't have the land described exactly and on motion it was decided to allow an amended one and the defendant answers and files a written paper, called the answer. And those make up the issues to be tried by the court and the jury. [fol. 61] Now, when the case comes to an actual trial, the attorneys present to you their views, they call witnesses, they examine the witnesses, and cross examine the witnesses, and they do their best to elicit what are the real facts in connection with the matter. The judge's province in the case is to preside, to preserve order in the court, to rule upon questions of evidence to be admitted, that he thinks are pertinent or not pertinent and to ex-

plain to the jury what the issues are and what law applies; and then, gentlemen, you go to your jury room and you decide what is the truth, you decide the facts and you bring in a verdict. In this court the presiding judge has a right to discuss the facts and to indicate to you views he may have in regard to them, and if in the course of my charge I should indicate any views that I have on the facts you have a right, if you wish, to make use of them. You are not in any way bound by them, you are the sole judges of the facts.

In this case the plaintiff, A. N. or Andrew N. Cone, brings his action against West Virginia Pulp and Paper Company, which is a corporation which owns property in this State, and says that the company through its agents and servants entered upon this tract, described as one hundred six and one-half (106½) acres, and definitely described by metes and bounds in this complaint; that they entered upon it, cut timber and took it away; that it was his land, his timber; that it was an unlawful entry, it was a trespass and they ask damages in the sum of Twenty-five thousand ($25,000.00) Dollars.

I charge you, gentlemen, that there is no evidence in this case that there was any malicious entry. Under the [fol. 62] laws of this State you can sue for actual damages and for punitive or exemplary damages where there is evidence that one has maliciously and with evil mind come in and taken something away from you or broken in, over your objection, as in this case there is nothing of that kind, you are not warranted in finding exemplary damages.

Your consideration of the case is whose property was it, whose timber was it, and whether or not the West Virginia Pulp and Paper Company had the right to enter there and cut and whether it was a lawful entry or whether they entered upon the land of Cone and took the timber away. If you find the lands were Mr. Cone's you must find the damage to him and assess that in money. It is a pure and simple business matter. There is not sentimental matter in this case, it is a simple business matter, who owned the land, who owned the trees on the land. If you find the West Virginia Pulp and Paper Company owned it, they had a right to take it away, and you should find for the defendant. If Mr. Cone owned it, you should find such amount as you find he was damaged—the value of what they took away from him.

Now, gentlemen, in this case each side has claimed title and each side has put in deeds of title, deeds, written papers by which each attempts to trace his or its title down to the present date. I charge you that it is impossible in this case to go back to an actual grant by the Government, by the State, or before that time by the King of Great Britain, (a great many of these titles go back to the grant of the King) for the public records were destroyed in 1865 in Colleton [fol. 63] County when the Northern armies came through—those records there and in Columbia were destroyed. We can't trace deeds back of 1865 in Colleton County. You might find a deed written in another county or where somebody has a deed not recorded, but ordinarily you find nothing back of 1865. Each of these parties traces title of some kind. Each has criticized the other's title to lands, and descriptions and boundaries. All those are matters for you. I charge you, gentlemen, that in deciding as to title, in locating the lands, generally speaking these are the rules—the most important item, natural boundaries where you can find a river bank, sea-shore or some natural boundary or ravine. That is the highest evidence of a boundary. After that, and there are none of those here—artificial marks, monuments, blazes, banks, cuts, pipes, markers, stakes or anything else used to indicate the line. Then, after that we consider the adjacent boundaries, that is that a property is bounded on the North, East, South, or West by lands of A, B, C, or D; and after that the course and distances, and last of all, the amount of land said to be enclosed within the description. As our South Carolina Supreme Court has said in one of its cases, "that ordinarily one of the lowest in the scale of importance is the acreage given therein," though it is one of the measures and one of the items that you will have a right to consider.

In addition to the actual title that each claims, each claims possession, and I say to you, gentlemen, that your duties in this case are somewhat lightened by the fact that that is the somewhat more important item here, for after all, a suit for trespass means an unlawful or improper entry [fol. 64] on the lawful possession of another, and each side claims that he or it was in lawful possession of the land and you must consider the testimony, particularly in regard to those matters.

Now, I have been asked to charge you that under the law

of this State an adverse possession, that means possession held against a titled owner, adverse possession (Reading from Code of 1942, Vol. 1, Section 379) "Any person claiming a title founded upon a written instrument or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases.

"(1) Where it has been usually cultivated or improved."

Gentlemen, that doesn't apply here in this case. It was the testimony there was no arable land, and it wasn't cultivated.

"(2) Where it has been protected by a substantial enclosure." All parties agree there was no fence.

"(3) Where, although not enclosed, it has been used for the supply of fuel or of fencing timber, for the purpose of husbandry, or the ordinary use of the occupant."

Now, gentlemen, each side claims to have been in possession; each side claims to have been in lawful possession, and I think that is the most important thing you have to decide because each side claims it had legal title and possession was based upon legal title and if you should find one side was in possession and the other side was not in possession that would be your verdict in this case.

Now, then, for the plaintiff, Cone, there was testimony of certain witnesses that the lines were there, the canal was spoken of as the line separating it from the Waring or Perry tract of land. There was testimony the former [fol. 65] owner, Mr. Lamb Perry, said that canal was the line, "you mustn't go across it." You can give due weight to that because the rule is that lines can be proven by common hearsay and understanding in the community. Very often that is the only way they can be proven, and there is evidence that some of them went upon the land, they say it was this same tract of land and that they hunted and that Mr. Perry hunted after he conveyed it. These witnesses conflict. You have got positive testimony by numerous witnesses as to where the line was and you have a good deal of testimony as to possession on behalf of the plaintiff. The possession testimony amounts mainly to plaintiff's own testimony. He says he hunted on the place from time to time, over a course of years; he says that he cut some boards from fallen timber, and that he took off some posts. On the other hand the defendant company, through certain of its agents and employees, say that they posted the land, that

they plowed up and burned fire lines or fire-breaks and that they went over it from time to time to see that there was no poaching; and that even in recent years they have leased out the hunting rights. It is for you, and you solely, to determine whom you believe and what you believe.

I have taken away any question of exemplary damages because it is quite apparent in this case that both sides claim, in good faith, to be the owner of that property. You have here a man who has a deed, he says he has been paying taxes for twenty (20) odd years, and says he thought he owned it. On the other hand you have a company who bought the property and it comes down to it through a long chain of [fol. 66] title and it has been paying taxes on the property and actually goes and sells the timber on the property and says it acted in good faith; it was its timber and it still is its timber, what is there. Your verdict should decide whom this land belongs to and not only what damage was done, if any was done, and if Mr. Cone gets the property or the company retains the property.

There are small things here; in whose name the taxes were paid or how much land was returned for taxation—you can take those things for what they are worth. The fact you returned a tract of land doesn't mean you own it. The fact you paid taxes on it doesn't mean you are the owner and if two people happen to pay taxes on the same property that doesn't mean they both own it or that either owns it, the State will accept taxes from anybody that goes and makes a return, State and County, that is no proof of ownership. It may be some proof of ownership, you wouldn't waste your money paying taxes unless you thought or hoped you owned it, and the evidence in this case is they both paid taxes. There is some discrepancy as to whether the West Virginia Pulp & Paper Company paid it or the Cooper River Timber Company paid it but they said they paid the taxes.

Likewise a good deal has been said about the sale by the sheriff. When the sheriff advertised the property of A. N. Cone, he advertised the property he had put on the auditor's tax books, he didn't say it belonged to him, that doesn't say it belonged to A. N. Cone. When he advertises property of mine or yours he doesn't look at the title and decide whether you or I own it. You may consider if there is any evidence, any reason to believe

that the company was afraid of its title and went and [fol. 67] bought it in or you may conclude that the company, like a good many people do, when they see property advertised for taxes, they buy it in and get a title for it.

You were somewhat hampered in this case by reason of the fact we don't have any surveyors who followed the line or say how or where those plats were made. We have two plats, one made and introduced in behalf of the plaintiff and one introduced and made on behalf of the defendant. One shows the property as belonging to Mr. Cone and the other shows the property as belonging to West Virginia Pulp & Paper Company. You have heard considerable testimony as to the boundaries, the canal and as to common knowledge and hearsay in the community, you have heard a number of witnesses for the plaintiff, others for the defendant, some employees of the company, some former employees, some of them with no connection, two of them named Cone testifying these were not Cone lands; other Cones testified they were Cone lands. Now, gentlemen, these facts are for you to determine and you entirely.

In this case the plaintiff carries the burden of proof and must prove his case beyond no by the preponderance or the greater weight of the evidence. He brings this suit and it is encumbent upon him to prove it by the greater weight of the evidence. If he has satisfied you that he had title to this property or if he has satisfied you he was in lawful possession of this property then he is entitled to a verdict at your hands. If he has done that. And if he has failed to do that, if he has failed to carry the burden of proof or if the defendant has gone further than that and proven to your satisfaction that it owns the lands and it was in lawful possession of the land, then you must find for the defendant.

[fol. 68] If you find for the plaintiff you will find what was the actual damage suffered by him. The actual damage in this case would be the value of the timber that was cut and taken away. I charge you, gentlemen, that the cutting by the Carolina Logging Company, by Mr. Cooley's Company, as it was commonly referred to, if it was unlawful was for the benefit and at the instance of the West Virginia Pulp and Paper Company, so that if you find that the plaintiff did own the land, had possession

of it and is entitled to be reimbursed, you have a right to find a verdict against the defendant. You have to estimate, if you find for the plaintiff, how much it should be. You have heard the testimony, they put up two witnesses, one who testified about $25,000.00 and the other about $21,000.00. The testimony, as to valuation in this case, is rather unsatisfactory to my mind, from all standpoints, those witnesses went a month or six weeks ago and counted some rotten stumps. On the other hand the company brought a man who worked for Carolina Logging Company, who said he estimated it was about 600,000 feet of timber and gave the general estimate as to what he thought the value would be, around about a little over $6,000.00. You are dependent, however, upon such testimony as is produced here and the evidence given in this room. If you find that the plaintiff is entitled to a verdict then you may or you should find what is a value of the damages and that is what is the value of the timber taken, not exceeding, of course, the sum of $25,000.00, which is the amount sued for.

If you should not find the plaintiff is entitled to a verdict, if you find he has failed to sustain his case by the preponderance of the evidence, your verdict must be for the defendant.

[fol. 69] You will take with you the exhibits in this case and study them, read them in your room; you will take with you the amended complaint and the answer. On the back of one of these papers, labeled "amended complaint," you will find the clerk has written on there the words: "We the jury find for the....." If you find for the plaintiff you will add the word "plaintiff" and after the word "plaintiff" write out then, "so many dollars," the amount of the damages, and sign your name, Mr. Foreman, and date it today, May 22nd. If you find for the defendant, you will simply write the word "defendant" as the word and sign your name as foreman and date it.

The Court: Is there anything further?

Mr. Waring: I believe your Honor neglected to charge the 40 years statute.

The Court: Yes, I will charge it, if it applies.

Gentlemen of the jury, there is a statute in this State known as the 40 years statute, which says no action shall

be commenced in any case for the recovery of real property, or for any interest there, against the person in possession under claim of title by virtue of a written instrument, unless the person claiming his ancestor or grantor, was actually in possession of the same or a part thereof within 40 years from the commencement of such action. And the possession of a defendant, sole or connected pursuant to the provisions of this section, shall be deemed valid against the world after the lapse of said period.

That just means that if a man is in possession of the land he doesn't have to go back beyond 40 years, he can show 40 years possession and doesn't have to go beyond that.

The Court: Are there any exceptions to the charge? [fol. 70] Mr. Waring: The defendant would like to note an exception to that part of your charge in which you said that that cut by the Carolina Logging Company or corporation was for the benefit and at the instance of the West Virginia Pulp & Paper Company. I think that is the way you stated it.

The Court: Yes, that was about the way I stated it, and I repeat to you, gentlemen, that if you find the timber was cut by the Carolina Logging Company and it was cut by them, that it was cut at the instance of the West Virginia Pulp & Paper Company because the testimony is that its agent took them there and pointed out the place where they were to cut and sold it to them and you are warranted in finding a verdict against the West Virginia Pulp & Paper Company if you find the plaintiff is entitled to a verdict, of course.

PLAINTIFF'S EXHIBIT NO. P-A

Deed of Caroline F. Cone to A. N. Cone

STATE OF SOUTH CAROLINA,

Know All Men By These Presents, That I, Caroline F. Cone, of Dorchester County, in the State aforesaid, for and in consideration of the sum of Five Dollars and other valuable consideration to me in hand paid at and before the sealing of these presents by A. N. Cone, of Dorchester County, in the State aforesaid—farmer—the receipt whereof is hereby acknowledged, have granted, bargained,

[fol. 71] sold and released, and by these Presents do grant, bargain, sell and release unto the said A. N. Cone:

> All that certain lot, part, parcel or tract of land situated lying and being in Burns Township, Dorchester County, in the State aforesaid, containing one hundred six and one-half (106½) acres, more or less. Bounded as follows, viz: North by lands of J. Lamb Perry, East by lands said to be owned by Burton Lumber Company, formerly Sarah Cone, South by lands of F. Goodwine, formerly Sarah Cone, West by lands of M. C. Cone. All of above description more fully appears when reference is had to plat of property hereby conveyed, made by Jas. A. Postell, Surveyor, dated Aug. 16th A.D., 1920.

Together with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

To Have and to Hold, all and singular, the said premises before mentioned unto the said A. N. Cone, his Heirs and Assigns forever.

And I do hereby bind myself and my Heirs, Executors and Administrators, to warrant and forever defend, all and singular, the said Premises unto the said A. N. Cone, his Heirs and Assigns, against me and my Heirs, lawfully claiming, or to claim the same or any part thereof.

Witness my Hand and Seal this 16th day of August in the year of our Lord one thousand nine hundred and [fol. 72] twenty in the one hundred and 45th year of the Sovereignty and Independence of the United States of America.

/s/ Caroline F. Cone, L.S.

Signed, Sealed and Delivered in the presence of:

/s/ Lillie Cone, Luther Cone

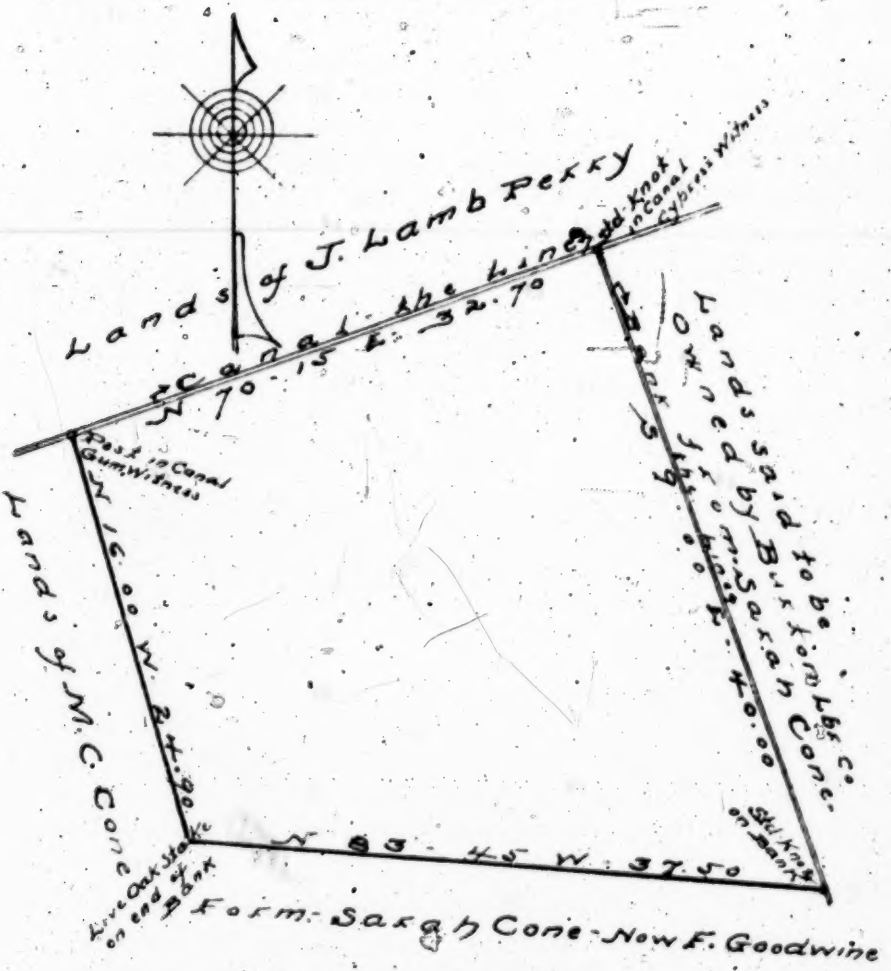
THE STATE OF SOUTH CAROLINA,
Dorchester County

Personally appeared before me Lillie Cone and made oath that she saw the within named Caroline F. Cone sign, seal, and as her act and deed, deliver the within written Deed; and that she with Luther Cone witnessed the execution thereof.

/s/ Lillie Cone.

Sworn to before me this 16th day of August, A.D. 1920. /s/ Jas. A. Postell (seal) Notary Public S. C. (seal)

[fol. 73] PLAINTIFF'S EXHIBIT P–B



Plat representing One Hundred and Six and one half (106½) Acres of Land Situated in Dorchester County - South Carolina Deeded by Mrs. Caroline F. Cone (his Mother) To A. N. Cone - August 16 - 1920.

Jos. A. Postell,
Surveyor.

Scale - 1 inch = 10 Chains

[fol. 74] PLAINTIFF'S EXHIBIT NO. P-D

CERTIFICATE OF AUDITOR OF DORCHESTER COUNTY, TRUE AND CORRECT COPY OF RECORDS, 5-14-45

STATE OF SOUTH CAROLINA
County of Dorchester

CERTIFICATE

St. George, S. C.
14 May, 1945.

I, the undersigned H. J. Patrick, duly elected and qualified Auditor for Dorchester County, South Carolina, hereby certify the following to be a true and correct copy of records under my supervision in the County Court House of Dorchester County:

1.	1944	Burns	School	District	No. 22	A. N. Cone	106½ acres	Pd.
	1943	"	"	"	"	"	"	"
	1942	"	"	"	"	"	"	"
	1941	"	"	"	"	"	"	"
	1940	"	"	"	"	"	"	"
	1939	"	"	"	"	"	"	"
	1938	"	"	"	"	"	"	"
	1937	"	"	"	"	"	"	"
	1936	"	"	"	"	"	"	"
	1935	"	"	"	"	"	"	"
	1934	"	"	"	"	"	"	"
	1933	"	"	"	"	"	"	"
	1932	"	"	"	"	"	"	"
	1931	Burns School District—Formerly No. 11 now No. 22						
						A. N. Cone	106½ acres	Pd.
	1930	Burns	School	District	No. 11	A. N. Cone	106½ acres	Pd.
	1929	"	"	"	"	"	"	"
	1928	"	"	"	"	"	"	"
	1927	"	"	"	"	"	"	"
	1926	"	"	"	"	"	"	"
	1925	"	"	"	"	"	"	"
	1924	"	"	"	"	"	"	"
	1923	"	"	"	"	"	"	"
	1922	"	"	"	"	"	"	"
	1921	"	"	"	"	"	"	"

[fols. 75-76]

2.	1915	Burns	School	District	No. 11	Miles Cone	385 acres	Pd.
	1916	"	"	"	"	"	"	"
	1917	"	"	"	"	"	320 acres	"
	1918	"	"	"	"	"	"	"
	1919	"	"	"	"	"	"	"
	1920	"	"	"	"	"	"	"
3.	1917	Burns	School	District	No. 11	Mrs. C. F. Cone	55 acres	Pd.
	1918	"	"	"	"	"	50 acres	"
	1919	"	"	"	"	"	"	"
	1920	"	"	"	"	"	"	"
	1921	Personal Property only						

Certified under seal in my office this 14th day of May, 1945.

/s/ H. J. Patrick (L.S.) H. J. Patrick, Auditor, Dorchester County.

(Here follows 1 Photolithograph, side folio 77)

[fol. 78] DEFENDANT'S EXHIBIT NO. D-2

DEED OF J. LAMB PERRY TO WEST VIRGINIA PULP AND PAPER COMPANY DATED APRIL 5, 1924

THE STATE OF SOUTH CAROLINA,
County of Dorchester.

Know All Men by These Presents, that I, James Lamb Perry, of the City of Charleston in the County of Charleston and State aforesaid, for and in consideration of the sum of Ten ($10.00) Dollars and other good and valuable consideration to me in hand well and truly paid at and before the sealing and delivery of these Presents by West Virginia Pulp and Paper Company, a corporation duly organized under the laws of the State of Delaware, with principal place of business in the City of New York in the County and State of New York, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released and by these Presents do grant, bargain, sell and release unto the said West Virginia Pulp and Paper Company:

All that certain piece, parcel or tract of land situate, lying and being in the County of Dorchester and State of South Carolina, known as the "Cadden" tract, measuring and containing according to a plat thereof and of adjoining lands made by J. P. Gaillard, C.E., dated August 1923, Two Hundred Fifty-three (253) Acres, and Butting and Bounding according to said plat as follows: to the North on the road to [fol. 79] Summerville; to the East and South on "Lamb's" Plantation and to the West on "Carnes" Plantation, on lands of Glenn and on lands of Peter Daniels and having such shape, form, marks, particular boundaries, courses and distances as are represented and delineated on said plat, which said plat is hereby declared to be, *pro tanto*, a part and parcel hereof. Being the same premises which were conveyed to me, the said James Lamb Perry in and by the following deeds of conveyance: by Carolina Insurance and Realty Company by deed bearing date the 11th day of November, A. D. 1922, to be recorded; by M. J. Cadden by deed bearing date the 2nd day of May, A. D. 1910, to be recorded; by Lula Georgie

I am area marked
not produce a plat of
Tantiate his Claim, and
practically a continuation
stained, I have accepted
line J.P.G. Aug 1923.

Limehouse

Tuttle R Edwards

PINE-LAN
460.0 Ac.

T. J. Wright

Waring

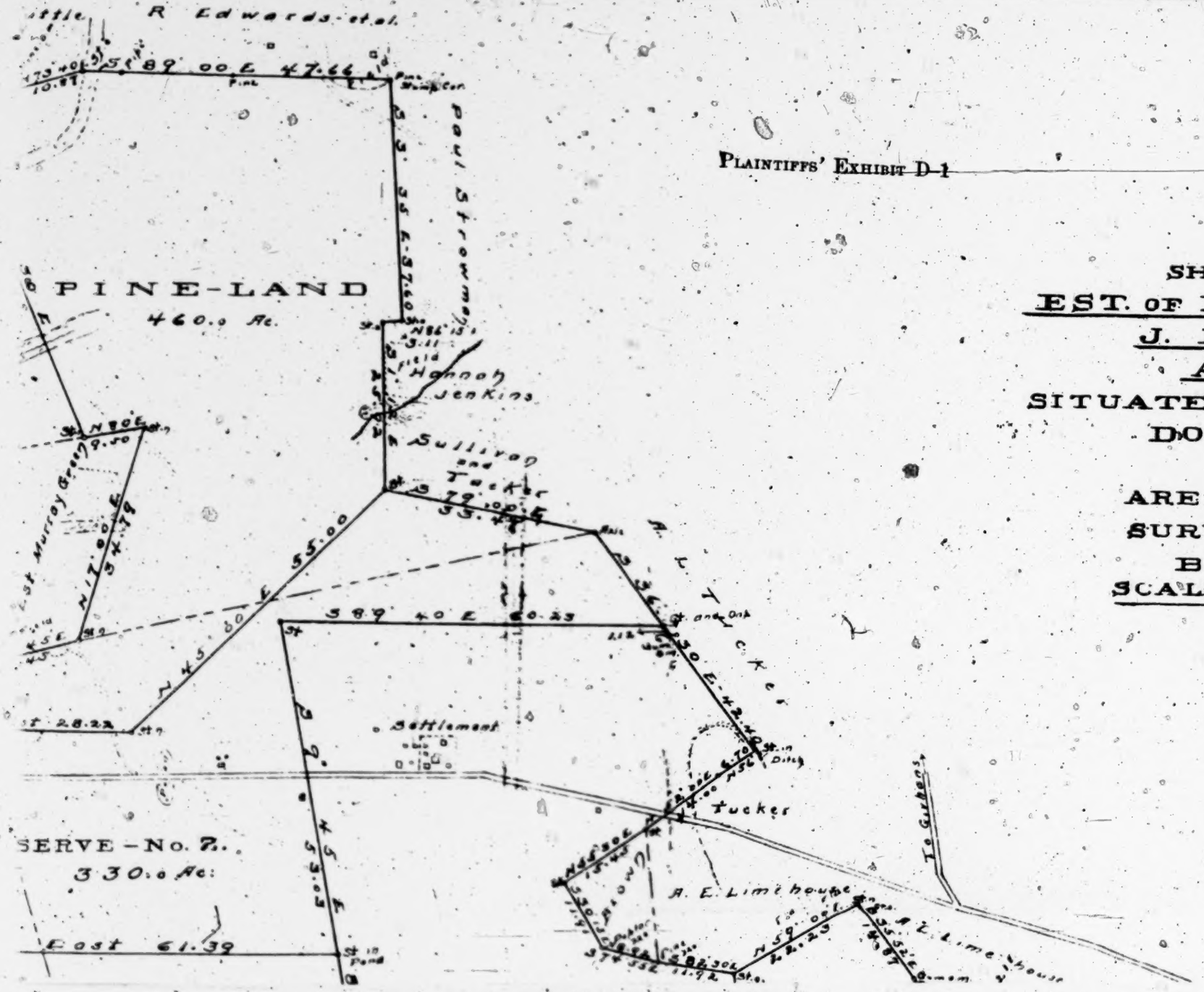
Part of
Lambs

RESERVE
No-4-7.0Ac.

RESERVE - No. 2.
330.0 Ac.

Lost 61.39

PLAINTIFFS' EXHIBIT D-1



MAP

SHOWING LAND OF

EST. OF MARTHA H. PERRY,

J. LAMB PERRY,

A. S. PERRY,

SITUATE IN ST. PAULS PARISH

DORCHESTER, CO.

S. C.

AREA-8194.0 ACRES.

SURVEYED-AUG. 1925.

BY J. P. Gaillard, C.E.

SCALE 1-INCH=20-CHAINS.

Dunlap, Harmon Cadden and Horace Cadden by deed bearing date the 19th day of October, A. D. 1908, to be recorded and by Louis Cadden, Ransome Cadden, Martha E. Drose and Eliza Hansom White by deed bearing date the 28th day of December, A. D. 1906, recorded in the office of the Clerk of Court for Dorchester County in Deed Book 9, page 553. ALSO

All that certain piece, parcel or tract of land situate, lying and being in the County of Dorchester and State of South Carolina, known as the "WARING" tract, measuring and containing according to the aforesaid plat made by J. P. Gaillard, C.E., dated August 1923, of said Waring tract and adjoining lands, Eight Hundred Sixty-eight (868) Acres, and Butting and Bounding according to said plat as follows: to the North on "Lamb's" Plantation; to the [fol. 80] East on "Harrietville" or "Scott's" Plantation, on lands of the Presbyterian Church and on lands of W. M. Cone; to the South on lands of R. M. Limehouse, on lands of the Presbyterian Church, on lands of W. M. Cone, on lands of S. E. Cone and on the "Ben Perry" tract, and to the West on lands of Miles Cone and on the "Ben Perry" tract, and having such shape, form, marks, particular boundaries, courses and distances as are represented and delineated on said plat, which said plat is hereby declared to be, *pro tanto,* a part and parcel hereof. Being the same premises which were conveyed to me, the said James Lamb Perry by Mary Josephine Waring by deed bearing date the 18th day of September, A. D. 1899, recorded in the office of the Clerk of Court for Dorchester County in Deed Book 2, page 213.

Together with all and singular the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

To Have an to Hold, all and singular, the said Premises before mentioned unto the said West Virginia Pulp and Paper Company, its successors and Assigns forever.

And I do hereby bind myself and my Heirs, Executors and Administrators, to warrant and forever defend, all and singular, the said Premises unto the said West Virginia Pulp and Paper Company, its successors

and Assigns, against myself and my heirs and all persons whomsoever lawfully claiming, or to claim the same, or any part thereof.

Witness my Hand and Seal, this 5th day of April, [fol. 81] in the year of our Lord one thousand nine hundred and twenty-four in the one hundred and forty-eighth year of the Sovereignty and Independence of the United States of America.

/s/ J. Lamb Perry, (L.S.)

Signed, sealed and delivered in the presence of:
/s/ Blackburn Hughes, /s/ William D. Comings.

THE STATE OF SOUTH CAROLINA,
County of Charleston.

Personally appeared before me Blackburn Hughes and made oath that he saw the within names James Lamb Perry sign, seal, and as his Act and Deed, deliver the within written Deed; and that he with William D. Comings witnessed the execution thereof.

Sworn to before me, this 18th day of April, A.D. 1924.
/s/ Blackburn Hughes. /s/ Capers G. Barr (L.S.)
Notary Public for S. C.

Within deed although dated April 5th 1924 was not delivered until this 18th day of April 1924. /s/ J. Lamb Perry, (Seal) Recorded April 29th, 1924. Grantor A. Widower.

S. C. D. Stamps Cancelled $37.00
Revenue 37.00

[fol. 82] DEFENDANT'S EXHIBIT No. D-3

Deed of Mary Joseph Waring to J. Lamb Perry

The State of South Carolina.

Whereas I. Mary Joseph Waring of the Town of Summerville, Dorchester County, State aforesaid am the owner in fee of an undivided half right title and interest in and to a certain tract or Plantation known as Hope Plantation in the County of Dorchester formerly a part of Colleton County in the State aforesaid which said Plantation was by deed bearing date the 1st day of April 1859 conveyed to Mary S. War-

ing and Josephine M. Waring by Tupper Master under order of Court entitled Perry *et al Exors.* v. Perry *et al*—and whereas I as sole heir at law of Joseph Ioor Waring and Mary S. Waring deceased am justly entitled and in possession of the other one undivided half part of said Hope Plantation, (which said) Sixty-three acres more or less adjoining same and for over forty years forming part of said Hope Plantation which said sixty-three acres of Swamp land was conveyed to Joseph Ioor Waring by deed and plat annexed to deed bearing date 22nd December 1839 by E. B. Scott deceased.

And whereas I am now minded for valuable consideration to convey the said tracts, which for 40 years has formed one tract unto J. Lamb Perry.

Know all men by these presents, That I, Mary Joseph [fol. 83] Waring of the Town of Summerville, County and State aforesaid, in my own right and as the sole heir of Joseph Ioor and Mary S. Waring, who have long since departed this life in the State aforesaid in consideration of the sum of One thousand ($1,000) Dollars to me paid by J. Lamb Perry in the State aforesaid, (receipt whereof is hereby acknowledged) have granted, bargained, sold and released, and by these presents, do grant, bargain, sell and release unto the said J. Lamb Perry all those two tracts of land, which from 1859 to date has formed one tract containing 563 acres more or less known as Hope Plantation and Jos. Ioor Waring tract of 63 acres (purchased in 1839 by said Waring from E. B. Scott)—Described separately as follows: All that Plantation or tract of land situate, lying and being in the Parish of St. Paul's in the District of Colleton (now Dorchester County) and State aforesaid called the Hope Plantation Containing Five hundred Acres more or less Butting and Bounding to the North on lands of James T. Lamb (now Perry), East and South on lands of Estate of Jos. Ioor Waring and West on lands of the estate of Benj. Perry (now Perry), being the property conveyed to Mary S. Waring and Josephine M. Waring by Tupper Master, April, 1859.

Also all that tract of Swamp land Containing 63 acres more or less Butting and Bounding on the North and East by lands of Elias B. Scott (now Perry), West by lands of Jos. Ioor Waring and South by Public Road as

will more fully appear by a plat attached to Deed from E. B. Scott to Jos. Ioor Waring dated 22nd day of December, 1839, Recorded R.M.C. Office Colleton District in Book O at page 162 April, 1840—The property hereby in-
[fol. 84] tended to be conveyed includes all the Plantation property in what was once known as St. Paul's Parish of old Colleton County belonging to the Estate of Jos. Ioor Waring, Estate of Mary S. Waring and of Mary Joseph Waring.

Together with all and singular the Rights, Members, Hereditaments, and Appurtenances to the said premises belonging, or in anywise incident or appertaining.

To have and to hold all and singular the said premises before mentioned, unto the said Jas. Lamb Perry his Heirs and Assigns forever. And I, Mary Joseph Waring do hereby bind myself my Heirs, Executors and Administrators, to warrant and forever defend all and singular the said premises unto the said Jas. Lamb Perry his Heirs and Assigns against me and my Heirs and all persons whomsoever lawfully claiming or to claim the same, or any part thereof.

Witness my Hand and Seal this 18th day of September in the year of our Lord one thousand eight hundred and ninety-nine and in the One hundred and twenty-fourth year of the Sovereignty and Independence of the United States of America.

/s/ M. J. Waring (Seal). ($1.00 in Documentary Stamps)

Signed, Sealed and Delivered in the Presence of /s/ J. Allen Miles, /s/ L. J. Simons.

[fol. 85] The State of South Carolina,
County of Dorchester.

Personally appeared before me J. Allen Miles and made oath that he saw the within named M. J. Waring, Sign, Seal, and as her Act and Deed, deliver the within written Deed, and that with L. J. Simons witnessed the execution thereof.

/s/ J. Allen Miles.

Sworn to before me this 4th day of December, A. D. 1899. (Seal), /s/ Richard B. Smythe, Notary Public for S. C., Recorded this 5th day of December, 1899.

DEFENDANT'S EXHIBIT D-4

Deed from James Tupper, Master, to Mary S. Waring and Josephine M. Waring

The State of South Carolina

To all to whom these Presents shall come or be made known, Or whom the same may in anywise Concern, I, James Tupper, Master in Equity for the District of Charleston, the said State,

Send Greeting

Whereas, Sarah F. Perry Executrix and Archibald [fol. 86] S. J. Perry and Thomas R. Waring Executors of Benjamin Perry deceased on or about the eleventh day of November in the year one thousand eight hundred and fifty eight did exhibit their Bill of Complaint in the *Court of Equity* at Charleston in the District of Charleston and State aforesaid, against Jane Waring Perry, Martha Waring Perry, Richard Waring Perry, Thomas Waring Perry, Mary S. Waring and Josephine M. Waring for general relief, and the said Defendants having appeared, answered the said Bill and submitted their several rights and interests in the said premises to the Court, *and* the cause being at issue before the Honorable Court aforesaid, came on to be heard at its February sitting one thousand eight hundred and fifty nine when the said Court after full hearing thereof, and mature deliberation in the premises, did Order, Adjudge and Decree that the estate more particularly hereinafter set forth and described, should be conveyed by the Master of the said Court to Mary S. Waring and Josephine M. Waring in the proportion of one half to each, upon the said Mary S. Waring Executrix of Joseph Ioor Waring deceased paying to the said Master the balance due on the purchase of the Plantation hereinafter described, with interest thereon, all of which will more fully appear on reference to the Registry of the said Court where the order and decree final in the case made are on file.

Now, Know All Men, That I, the said James Tupper, Master of the said Court, in consideration of the premises, and also in consideration of the sum of *Fourteen hundred and sixty two Dollars and eighty nine cents*

paid me by the said Mary S. Waring and Josephine M. [fol. 87] Waring, the receipt whereof is hereby acknowledged, *have* granted, bargained, sold and released, and by these presents *Do* grant, bargain, sell and release unto the said Mary. S. Waring and Josephine M. Waring and their Heirs and Assigns, *All that Plantation or Tract of Land*, situate, lying and being in the Parish of St. Pauls in the District of Colleton and State aforesaid, called the Hope Plantation, containing Five hundred (500) Acres more or less, Butting and Bounding to the North on lands of James T. Lamb, East and South on lands of the Estate of Joseph Ioor Waring and West on lands of the Estate of Benjamin Perry, *Together* with all and singular the hereditaments, rights, members and appurtenances whatsoever, to the said Lands belonging or in anywise appertaining and the reversions and remainders, rents, issues, and profits thereof: *And* also the estate, right, title, interest, dower, possession, property benefit, claim and demand, whatsoever, both at law and in Equity of the said Benjamin Perry deceased and of all the parties to the said suit, and of all other persons rightfully claiming, or to claim the same, or any part thereof, by, from or under them or either of them.

To Have and to Hold the said Plantation or Tract of Land with its hereditaments, privileges, and appurtenances, unto the said Mary S. Waring and Josephine M. Waring their Heirs and Assigns to them and their only proper benefit and behoof forever.

In Witness Whereof, I, the said James Tupper, Master of the said Court, under and by virtue of the said Decree, have hereunto set my Hand and Seal, at Charleston, this first day of April in the year of our Lord One [fol. 88] thousand eight hundred and fifty nine and in the Eighty third year of the Sovereignty and Independence of the United States of America.

/s/ James Tupper, Master in Equity. (Official Seal)

Sealed and Delivered in Presence of /s/ James S. Simons, William Tupper.

SOUTH CAROLINA,
Charleston District.

Personally appeared James S. Simons and made oath that he saw James Tupper Esquire, Master in Equity, sign, seal and as his act, deliver the within deed; and that deponent together with William Tupper signed their names as witnesses thereto.

/s/ James S. Simons.

Sworn to before me this 21st Sept. 1859. /s/ F. I. Winkler, Not Pub & Ex Off Mag: Recorded April 29th, 1924.

[fol. 89] DEFENDANT'S EXHIBIT No. D-5

Deed from Elias B. Scott to Joseph Ioor Waring

THE STATE OF SOUTH CAROLINA.

Know All Men by These Presents, THAT I, Elias B. Scott, of St. Pauls Parish in the State aforesaid, in consideration of the sum of One Hundred & Twenty Six Dollars to me paid by Joseph Ioor Waring of St. Pauls Parish Colleton District in the State aforesaid, have granted, bargained, sold, and released, and by these presents, Do grant, bargain, sell, and release, unto the said Joseph Ioor Waring that tract of swamp land containing sixty three acres more or less, butting and bounding on the North and East by lands of Elias B. Scott, West by lands of Joseph I. Waring & South by public road as will more fully appear by a plat attached to this. TOGETHER with all and singular the Rights, Members, Hereditaments, and Appurtenances, to the said Premises belonging, or in any wise incident or appertaining:

To Have and to Hold all and singular the Premises before mentioned, unto the said Joseph Ioor Waring his Heirs and Assigns, forever. And I do hereby bind myself & my Heirs, Executors, and Administrators, to warrant and forever defend all and singular the said Premises, unto the said Joseph Ioor Waring his Heirs and Assigns, against me and my Heirs, lawfully claiming, or to claim the same, or any part thereof.

Witness my Hand and Seal this twenty second day of December in the year of our Lord one thousand eight

[fol. 90] hundred and Thirty nine and in the Sixty-fourth year of the Independence of the United States of America.

/s/ Elias B. Scott.

Signed, Sealed, and Delivered in the Presence of /s/ Mary Anna McPherson, /s/ Lewis Hutson (Seal).

THE STATE OF SOUTH CAROLINA.
Colleton District.

Personally appeared before me Mrs. Mary Anna McPherson and made oath, that she saw the within named Elias B. Scott sign, seal, and as his act and deed, deliver the within written deed; and that she with Lewis Hutson witnessed the execution thereof.

/s/ Mary Anna McPherson.

Sworn before me 22nd this day of December, 1839.
/s/ Thos. B. Miles (Q N)

THE STATE OF SOUTH CAROLINA,
Colleton District.

RENUNCIATION OF DOWER

I Thomas B. Miles one of the Justices of the Quorum do hereby certify unto all whom it may concern, that Mrs. Caroline E. Scott the wife of the within named Elias B. Scott did this day appear before me, and upon [fol. 91] being privately and separately examined by me, did declare that she does freely, voluntarily, and without any compulsion, dread, or fear of any person, or persons whomsoever, renounce, release, and forever relinquish unto the within named Joseph Ioor Waring, his Heirs and Assigns, all her interest and estate, and also all her right and claim of dower, of, in, or to, all and singular the premises within mentioned and released.

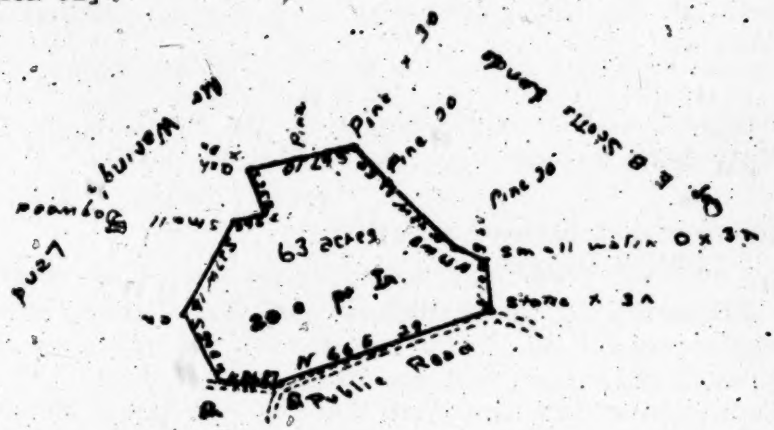
Given under my Hand and Seal, this 22nd day of December *Anno Domini*, 1839.

/s/ Thos. B. Miles (Q N)

/s/ Caroline E. Scott

Recorded March 29th, 1924.

[fol. 92]



South Carolina.

Pursuant to request of Cap. E. B. Scott I have resurveyed and admeasured a small tract of Land containing Sixty three acres Situated in Colleton District St. Paul's Parish and hath such Buttings and Boundings shape and marks as the above Plat represents Surveyed the 10th day of May 1839.

By /s/ F. I. Mellard, D.S.

[fol. 93] Defendant's Exhibit No. D-6

Deed from Mary S. Waring and Mary Joseph Waring to John Cone

The State of South Carolina.

Know all men by these presents that we Mary S. Waring & Mary Joseph Waring heirs at law of Joseph I. Waring of Colleton County deceased who died seized in fee of the premises hereinafter mentioned in the State aforesaid in consideration of the sum of one hundred and forty three dollars to us in hand paid at and before the sealing of these presents by John Cone of Colleton County in the State aforesaid Farmer (the receipt whereof is hereby acknowledged) have granted bargained sold and released and by these presents do grant bargain sell and release unto the said John Cone.

All that tract of land situate lying and being in St. Pauls Parish Colleton County and State aforesaid measuring and containing one hundred and forty three acres more or less. Butting & Bounding to the No. th on lands of

the Estate of the said Joseph I. Waring East on lands of Estate of James Perry South and South East on lands of the Estate of James Perry and West on lands of Miles Cone and having such shape marks and lines as are delineated on a plat of said tract made by Louis A. Strobel Esquire Deputy Surveyor dated the seventh day of April A. D. 1880.

Together with all and singular the rights members hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

[fol. 94] To have and to hold all and singular the said premises before mentioned unto the said John Cone his heirs and assigns forever. And we do hereby bind ourselves & our heirs executors and administrators to warrant and forever defend all and singular the said premises unto the said John Cone his heirs and assigns against us and our heirs and all other persons lawfully claiming or to claim the same or any part thereof.

Witness our hands and seals this thirteenth day of April in the year of our Lord one thousand eight hundred and eighty and in the 104 year of the Sovereignty and Independence of the United States of America.

Mary S. Waring (L.S.)
Mary J. Waring (L.S.)

Signed, sealed and delivered in the presence of M. E. Johnson, M. E. Hutchinson.

STATE OF SOUTH CAROLINA,
Colleton County.

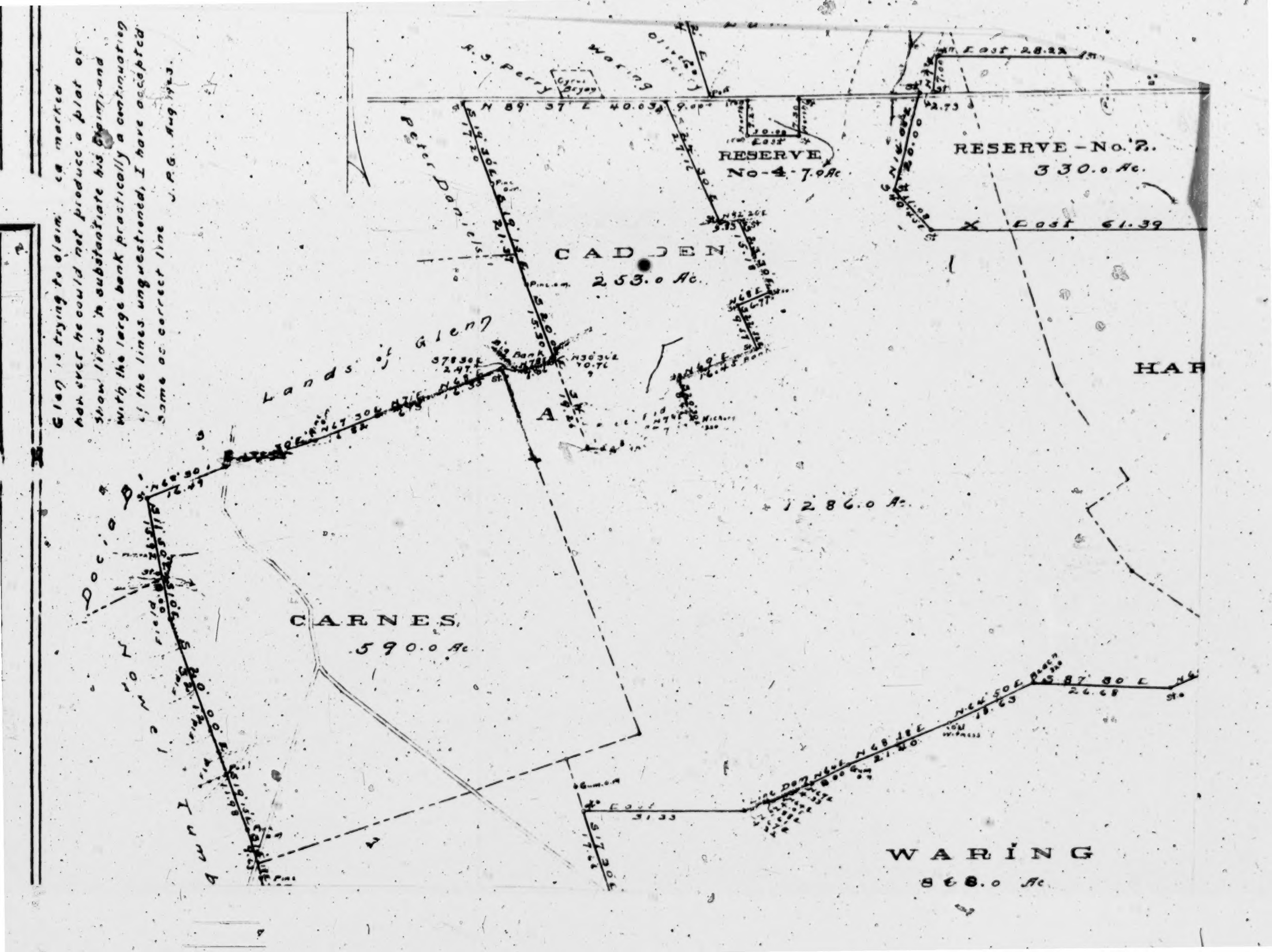
Personally appeared before me M. E. Hutchinson and made oath that he saw the within named Mary S. Waring [fol. 95] and Mary Joseph Waring sign seal and as their act & deed deliver the within written deed; and that he with Mary Edith Johnson witnessed the execution thereof.

M. E. Hutchinson

Sworn to before me this thirteenth day of April 1880 Josiah J. Perry (L.S.) Trial Justice Recorded March 4, 1884.

I hereby certify the foregoing to be a true copy as is recorded in Book No. 2 page No. 63.

H. D. Padgett, Clerk of Court


Glen is trying to claim as marked
but ever he could not produce a plat or
show title to substantiate his claim and
with the large bank practically a contractor
if the lines unquestioned, I have accepted
same as correct line
J. P. G. Aug 1923
A. S. Perry
Waring
Peter Donnelly
RESERVE
No-4-7.0Ac.
RESERVE-No. 2.
330.0 Ac.
CADDEN
253.0 Ac.
Lands of Glen
1286.0 Ac.
CARNES.
590.0 Ac.
WARING
868.0 Ac.
HAR

SERVE – No. 2.
330.0 Ac.

Lost 61.39

Settlement

Tucker

To Gutheys

A. E. Limehouse

A. L. Limehouse

M. M. Limehouse

A. S. PERRY
608.0 Ac.
RESERVE - No. 1
608.0 Ac)

HARRIETVILLE - OR SCOTTS.
1392.0 Acres

RESERVE
No. 3.
118.0 Ac

M. Perry

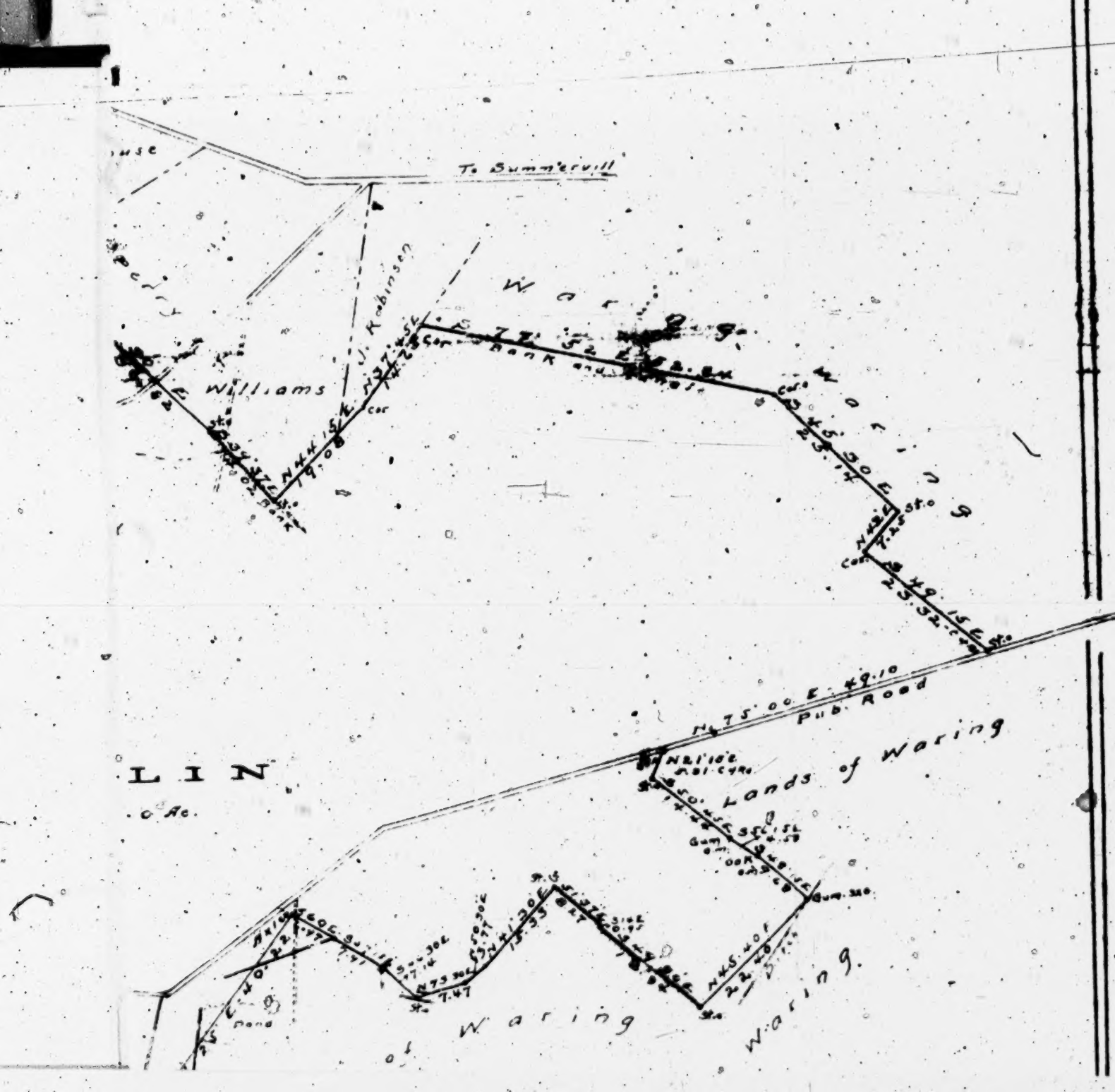
E. Williams

J. Robinson

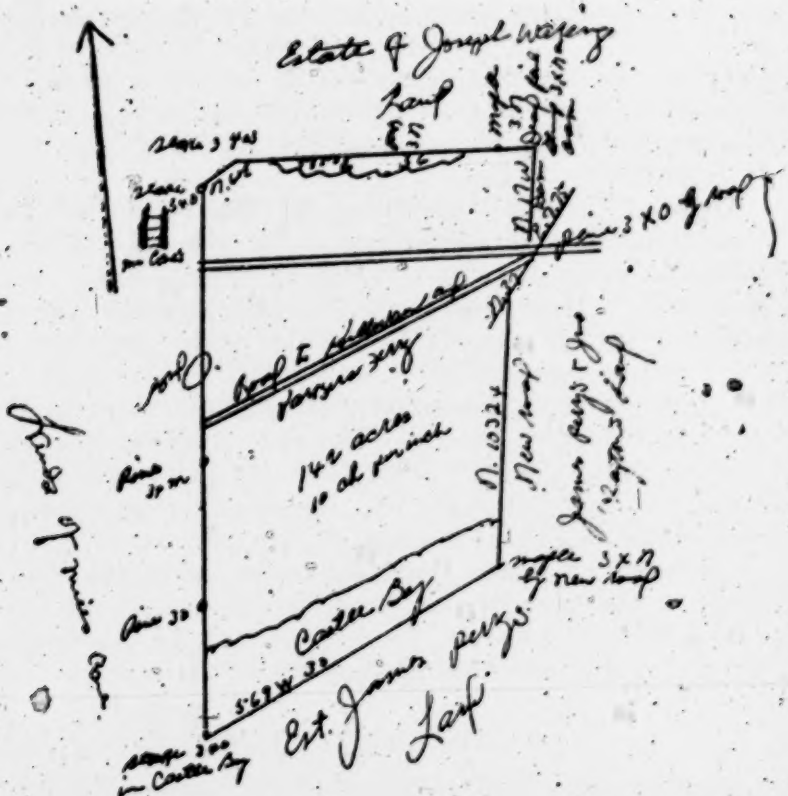
Kiddell Road

ROSLIN
2005.0 Ac.

ING


To Summerville
J. Robinson
Waring
E. Williams
Cor
Cor
Cor

[fol. 96]



SOUTH CAROLINA.

The above plan represents one hundred and fifty-three acres of land situated in St. Pauls Parish Colleton County being a portion of a tract of land belonging to the Estate of Joseph I. Waring, dec'd. and Surveyed for John Coné Esq. and it has such marks and boundaries as are above shown, Surveyed April 7, A. D. 1883, Louis A. Strobel, D. S. Recorded March 4, 1884.

I hereby certify the above to be a true copy of plat as recorded in Book No. 2 page 65.

H. D. Padgett, Clerk of Court

[fol. 97] DEFENDANT'S EXHIBIT NO. D-13

Deed of Adam Miles Cone to Miles Cone, Dated September 19, 1888, With Plat

A. MILES CONE TO MILES CONE

THE STATE OF SOUTH CAROLINA.

Know all men by these presents, that I, Adam Miles Cone of St. Paul's Parish Colleton County, in the State aforesaid, Farmer, in consideration of the sum of Three Hundred Dollars to me paid by Miles Cone in the State aforesaid, Farmer have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said Miles Cone All of that piece or parcel of land situated in St. Pauls Parish County and State aforesaid, containing Two Hundred and Forty-eight acres, more or less, and bounded on the North by A. S. J. Perry, South by Est of Jennings Perry, on the West by Franklin Cone & on the East by John Cone formerly known as the Josiah Perry Estate tract Also all of that piece of land lying and being in St. Pauls Parish Colleton County, containing Seventy two acres, more or less, bounded on North by A. S. J. Perry South by lands of A. Miles Cone, East by above mentioned Tract of 248 acres and on West by Franklin Cone formerly belonging to H. Willis, but conveyed to A. M. Cone. "Together with all and singular the Rights, [fol. 98] Members, Hereditaments and Appurtenances to the said Premises belonging or in anywise incident or appertaining."

To Have and To Hold all and singular the said premises before mentioned unto the said Miles Cone his heirs and Assigns forever. And I do hereby bind myself and my heirs executors, and administrators, to warrant and forever defend all and singular the said premises unto the said Miles Cone his heirs and assigns against me and my heirs lawfully claiming, or to claim the same or any part thereof.

Witness my hand and seal this Nineteenth day of September in the year of our Lord one thousand Eight hundred and Eighty Eight and in the one hundred and twelfth year of the Sovereignty and Independence of the United States of America.

A. M. Cone (L.S.)

Signed, Sealed and delivered in the presence of H. H. Pooser, L. G. Owens.

[fol. 99] THE STATE OF SOUTH CAROLINA,
Colleton County.

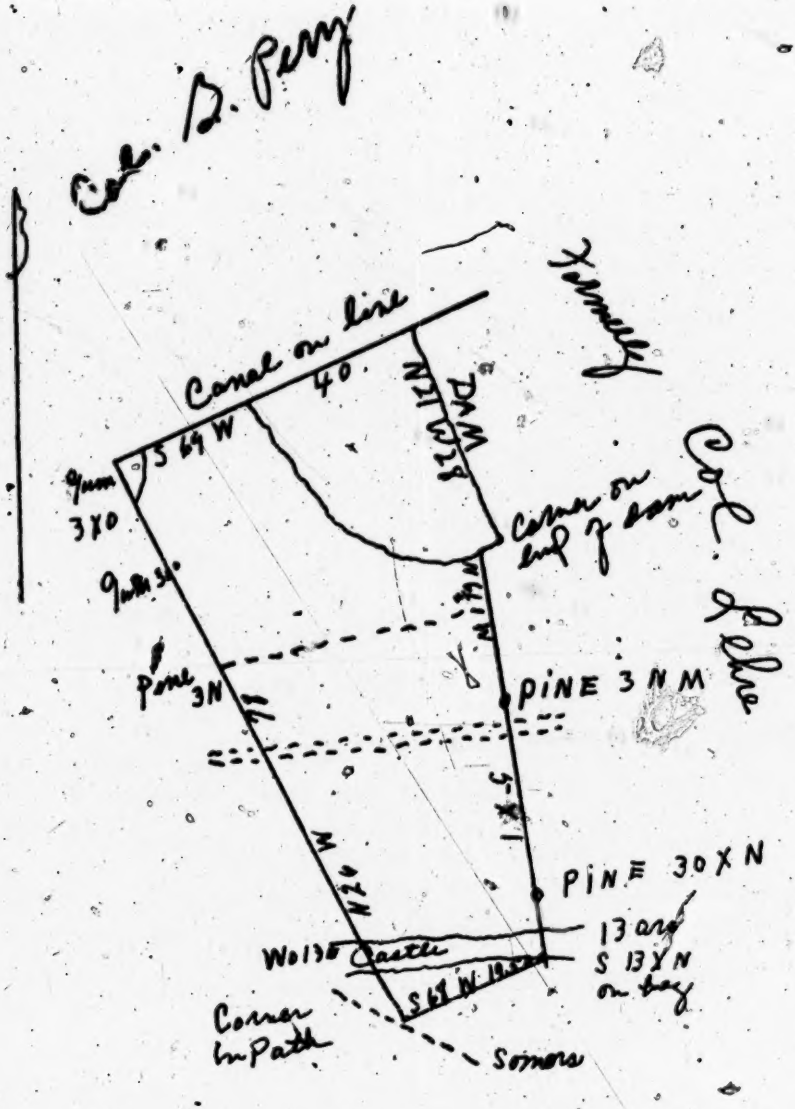
Personally appeared before me W. H. Pooser and made oath that he saw the within named Adam Miles Cone sign seal, and as his act and deed deliver the within written Deed and that he with L. G. Owens witnessed the execution thereof.

W. H. Pooser.

Sworn to before me this 19 day of Sept. A. D. 1888.
Louis A. Strobel, Notary Public. Recorded Oct. 6, 1888.
I certify the foregoing to be a true copy is Recorded in Book No. 7 Page 282.

H. D. Padgett, Clerk of Court.

[fol. 100]



248 Acres
Scale 20 chs per inch

Plat of two hundred and forty eight acres of land in St. Pauls Colleton District near Beach Hill belonging to the Est. of Josiah Perry—Surveyed and platted Jan. 15 1847 By T. P. Cooper, D. S.
Recorded Oct. 6, 1888.

[fol. 101] DEFENDANT'S EXHIBIT D-14.

Record of James Tupper, Master in Equity, Dated March 2, 1859

SARAH F. PERRY, EXECUTRIX & ARCHIBALD S. I. PERRY & THOMAS R. WARING, EXECUTORS OF BENJAMIN PERRY, DECEASED

vs.

JANE WARING PERRY, MARTHA WARING PERRY, et al.

Under the order of reference to report upon the facts in this case I have been attended by the Solicitors of the parties and by consent report.

Benjamin Perry, who died in April 1857 sold some time about the year 1828, to Joseph I. Waring a plantation in St. Pauls Parish containing 800 acres for $1400, but executed no conveyance. This plantation has been in possession of Mr. Waring and his heirs for over 30 years, since the death of Mr. Waring and before the death of Mr. Perry the latter presented a claim against the Estate of the former for a balance due upon the purchase of the said plantation. Upon a search the following statement dated the 1st May 1834, was found among the papers of Mr. Waring.

Amount by agreement for Hope Plantation on 1st Dec. 1828	1400.00
Then deducted amt of Col Perrys note with interest and open a/c	893.50
Balance	$ 506.50
[fol. 102] Interest on 506.50 for 5 yrs 5 mos	194.88
	701.38
Then deduct for rice 66 bushels @ 80c	52.80
Bal due Col P this day, Say 1 May '34	649.58

The Admx of Mr. Waring, altho satisfied that from long adverse and continuous possession of over 30 years that the title of her Intestate was complete at Law, has agreed to pay the amount shewn to be due by the above memorandum with interest deducting $70. due to her by

Col Perry in his lifetime upon the execution of good and sufficient titles for the Plantation at the charge of Col Perrys Estate.

The object of the Bill is to perfect said title by conveying the interest of the minor children of Col Perry, who are parties to these proceedings.

It is clear that the Statutory title in Mr. Waring was complete long before the death of Col Perry, and that the offer of Mrs. Waring to pay the balance due on the purchase arises from a high sense of justice and right.

I do not hesitate to recommend that upon Mrs. Waring the administratrix of Joseph L. Waring paying into Court the balance herein ascertained to be due upon the purchase of Hope Plantation that titles therefor be executed under the order of this Court, and that after providing for the costs and expenses of these proceedings, that the surplus be paid to the Executrix & Executors of Col Perry upon their executing Bond with approved sureties in double the said surplus for the due administra-
[fol. 103] tion of said fund as provided in the previous decrees of this Court in relation to the sale of the Real Estate of Col Perry.

Respectfully submitted, James Tupper Master in Equity
2 March 1859.

Filed 8th March 1859.

DEFENDANT'S EXHIBIT No. D-15

Certified Copy of Decree of F. H. Wordlaw, Taken From Decree Book February 16, 1858 to September 24, 1861

SARAH F. PERRY, EXECUTRIX, ARCHIBALD S. I. PERRY, THOMAS R. WARING, EXECUTORS OF BENJAMIN PERRY, Deceased

vs.

JANE WARING PERRY, et al.

On hearing read the report of Master Tupper it is ordered on motion of Messrs. Macbeth & Buist, Complainant's Solicitors, that the same be confirmed.

It is also ordered that the Defendant Martha S. Waring, Administratrix of Joseph Ioor Waring, deceased, pay to the said Master the balance due on the purchase

of the Hope Plantation with interest thereon and that the said Master do execute a title to the said plantation to the Defendants Martha S. Waring and Josephine M. Waring in the proportion of one third to the former and two thirds to the latter.

[fol. 104] It is further ordered that the said Master, after deducting from the amount to be paid to him the costs of these proceedings and a counsel fee of one hundred dollars to the Solicitors of the Defendants, Martha S. and Josephine M. Waring, do pay over to the Complainants the balance upon the execution by them of a Bond in double the amount to be paid, conditioned for its due administration.

F. H. Wardlaw.

March 8th, 1859.

We consent, Lockwood & Ramsey

In this case it is further ordered that the above order be so far amended, that the Master do execute titles to Mrs. Waring and her daughter in the proportion of one half to each.

F. H. Wardlaw.

9 March 1859

JUDGMENT

This Action having been brought to trial at a District Court held on the 22nd day of May, A. D. 1945, and a verdict for the Plaintiff having been rendered therein by the jury for the sum of Fifteen thousand and no/100 ($15,000.00) Dollars, and the costs having been adjudged at Eighty-seven and 70/100 ($87.70) Dollars;

Now, on motion of Messrs. Jefferies, McLeod & Unger, Attorneys for said Plaintiff

It is Adjudged that Plaintiff recover of said West Virginia Pulp & Paper Company, a corporation, Fifteen thousand and no/100 ($15,000.00) Dollars, so [fol. 105] found, with interest from May 22, 1945, at 6%, and Eighty-seven and 70/100 ($87.70) Dollars, costs.

Messrs. Jefferies, McLeod & Unger, Plaintiff's Attorneys.

Ernest L. Allen, C., D. C. U. S., E. Dist. S. C. June 5, 1945.

NOTICE OF MOTION FOR NEW TRIAL

TO MESSRS. JEFFERIES, MCLEOD & UNGER,
ATTORNEYS FOR THE PLAINTIFF:

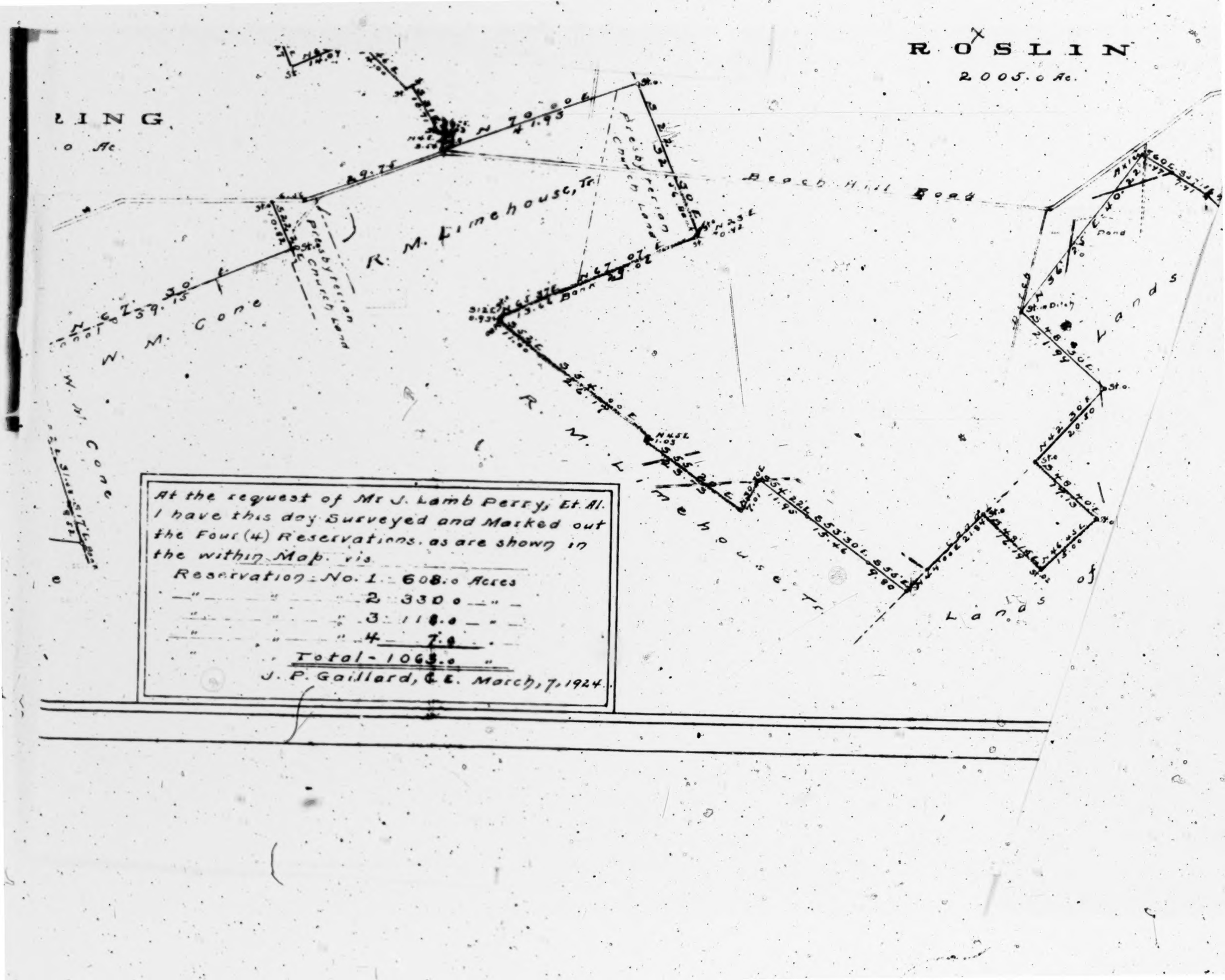
You Will Please Take Notice that the defendant above named, by its undersigned attorneys, will move before the Honorable J. Waties Waring, United States District Judge for the Eastern District of South Carolina, in the United States Courtroom in Charleston, South Carolina, on the 6th day of August, 1945, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel may be heard for an order granting a new trial in the above entitled cause, upon the ground that new evidence has been discovered which, despite reasonable diligence on behalf of the Plaintiff, was not discovered prior to the trial, in that:

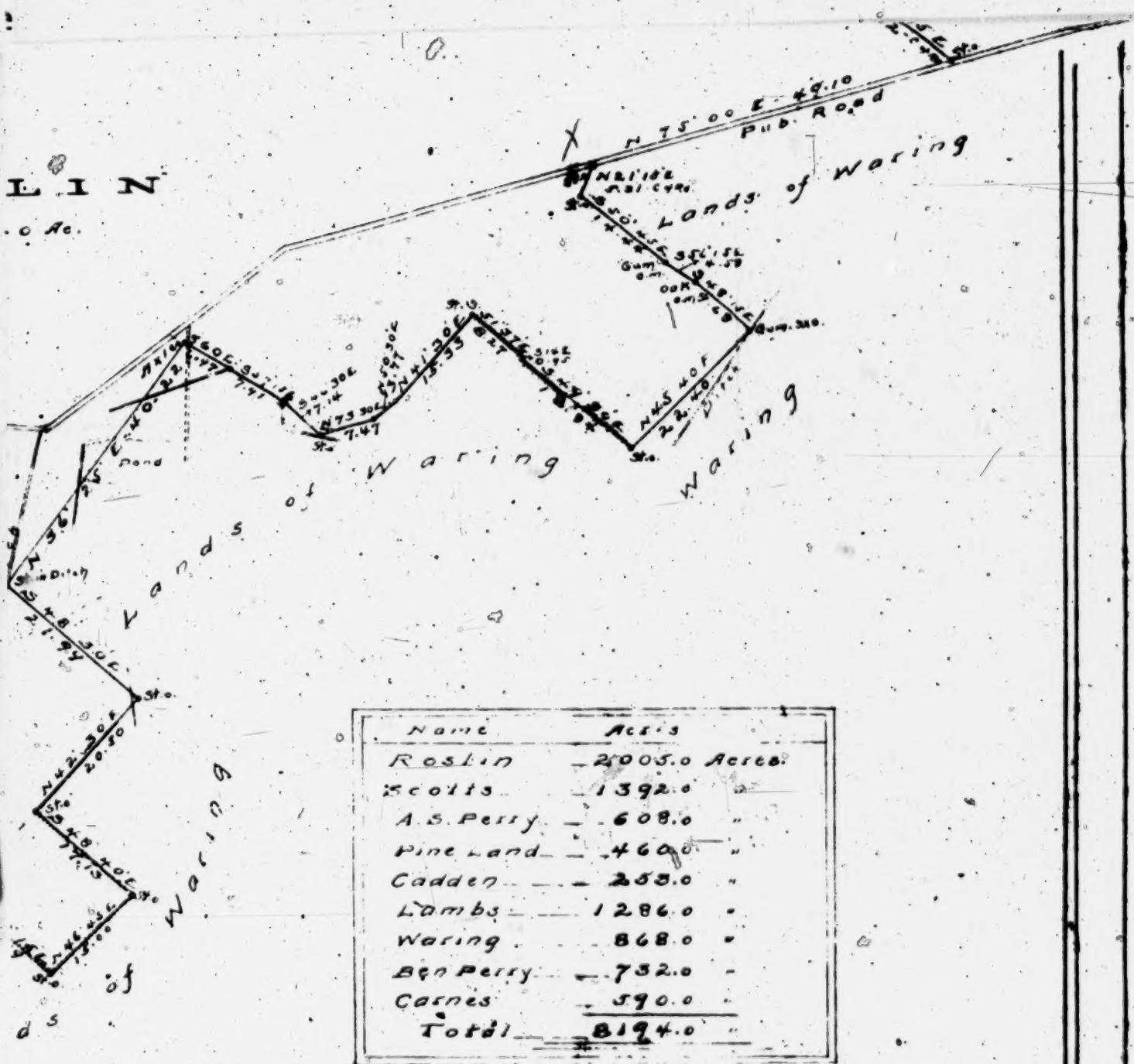
1. As will appear from the affidavit and exhibits hereto attached and from the record in the cause, there has been discovered since the trial, upon the public records of Dorchester County, documentary evidence showing that Miles Cone did not convey any part of his 320 acre tract [fol. 106] in Burns Township to his wife, Caroline F. Cone, which evidence disproves the unsubstantiated oral testimony of the plaintiff's witnesses that Miles Cone did convey the property which is the subject of the action to his wife, Caroline F. Cone, without which testimony the Plaintiff failed to establish his ownership of the property and recovery cannot be had.

2. As will appear from the affidavit and exhibits hereto attached and from the record in the cause, there has been discovered since the trial, upon the public records of Dorchester County, documentary evidence that Caroline F. Cone was the owner of lands in Burns Township other than the lands which are the subject of this action, which documentary evidence disproves and contradicts the testimony offered on behalf of the Plaintiff at the trial to the effect that the said Caroline F. Cone owned no other property in Burns Township at the time she allegedly conveyed the property in dispute to the Plaintiff, which testimony was offered by the Plaintiff to show acquisition of title to the disputed land and without which showing he could not have recovered in this action.

D. A. Brockington, Charles W. Waring, W[illegible]g & Brockington, Attorneys for the Defen[illegible]t, 35 Broad Street, Charleston, S. C.

Filed April 22nd 1924
and Recorded in Plat Book #3, Page 145-
And- Agreeably
Clerk of Court
Brunswick Co. N.C.


ROSLIN
2005.0 Ac.
LING
0 Ac
R. M. Limehouse, Tr.
Beach Hill Road
Presbyterian Church Land
Pond
Lands of
W. M. Cone
At the request of Mr J. Lamb Perry, Et. Al. I have this day Surveyed and Marked out the Four (4) Reservations as are shown in the within Map. viz
Reservation No. 1 608.0 Acres
" " 2 330.0 "
" " 3 118.0 "
" " 4 7.0 "
Total - 1063.0 "
J. P. Gaillard, C.E. March, 7, 1924.



Name	Acres
Roslin	2005.0 Acres.
Scotts	1392.0 "
A.S. Perry	608.0 "
Pine Land	460.0 "
Cadden	258.0 "
Lambs	1286.0 "
Waring	868.0 "
Ben Perry	732.0 "
Carnes	590.0 "
Total	8194.0 "

Note:
The interior lines of the above tracts were not Surveyed by me (Except the Cadden and Waring Tracts) but were Compiled from Old Maps - the above individual Areas was Calculated from the Compilation. J.P.G. Aug. 1923.

[fol. 107] AFFIDAVIT

STATE OF SOUTH CAROLINA,
County of Charleston.

Personally appeared before me Charles W. Waring, who being duly sworn, deposes and says as follows:

I am one of the Attorneys for the Defendant in the above entitled cause and prior to the trial thereof made an examination of the public records of Dorchester, Colleton and Charleston Counties of the State of South Carolina in an attempt to establish the correct recorded chain of title to the property involved herein.

It appears from the public records that this property is now located in Burns Township, Dorchester County, but prior to 1897 it was located in Colleton County and appears to have been a part of Colleton County or Colleton District continuously from the time of its formation (before the American Revolution) until 1897. It is an historical fact of common knowledge and is of evidence in this case, that the public records of Colleton County were destroyed in 1865 and for this reason it is impossible, in many instances, to fully abstract the titles to real estate which had its location in Colleton County as constituted prior to 1865. Hence, there must often exist an hiatus between the original grant from the Crown or the State and a conveyance of the land subsequent to 1865.

The Complaint states that the tract described therein is as shown by a Deed of Caroline F. Cone to A. N. Cone, dated 16th August, 1920, and recorded in the office of the Clerk of Court for Dorchester County, the 18th September, 1920, in Book 35 at Page 288. The Deed [fol. 108] so referred to was found recorded as indicated and it is through this Deed that A. N. Cone has based his ownership of the property. However, there is no public record of Dorchester or Colleton County which shows that Caroline F. Cone got title to this property and there is no way of discovering from any public record that, prior to her conveyance to Andrew N. Cone, there was any antecedent source of title.

A. N. Cone and his brother, Owen Cone, testified that Caroline F. Cone was their mother and that she died in 1924 and that their father, Miles C. Cone, died in 1941.

They also testified (over the Defendant's objection) that their father conveyed the property in question to their mother by a Deed of Conveyance in 1917, which Deed they said was not recorded and has been lost or destroyed. They further testified that this 106.5 acres in question was a part of a tract conveyed to Miles C. Cone by Adam Miles Cone, his father, by a Deed dated 19th September 1888 and recorded 6th October 1888 in the Office of the Clerk of Court for Colleton County in Book 7, Page 282, and in the Office of the Clerk of Court for Dorchester County in Colleton Transfer Deed Book 6, Page 138. This Deed to Miles C. Cone with the plat thereto annexed (Defendant's Exhibit D-13) is to be found in the respective offices referred to and describes two tracts of land containing, respectively, 248 acres and 72 acres or a total area of 320 acres. There is no indication on the records of Colleton or Dorchester Counties that any part of this property was ever transferred in any manner whatsoever from Miles C. Cone to Caroline F. Cone and there was no reason to believe from these records or from the pleadings that the property at issue [fol. 109] in this case came from the larger tract described in the Deed from Adam Miles Cone to Miles C. Cone. Furthermore, there was no word mentioned at the pre-trial conference, when matters pertaining to the trial appeared to be open to a full and frank discussion between the attorneys and the Court, which would have suggested Miles Cone as being a prior owner and the one from whom Caroline F. Cone acquired title.

In view of the fact that the boundings of the 320 acres conveyed by Adam Miles Cone to Miles C. Cone did not appear to include the property in question and in view of the fact that there was no deed of conveyance or any suggestion from any source of Caroline F. Cone having acquired any portion of this property, Deponent did not deem it necessary in preparing for trial to make a further examination of the public records in order to discover how Miles C. Cone disposed of his ownership in the 320 acres. The search of this Deponent was concentrated on attempting to find some transfer (whether by conveyance or inheritance) into Caroline F. Cone, and this could not be found on the records.

Since the date of trial of the above entitled cause,

Deponent has made a further examination of the records of Dorchester County, by reason of the surprising development at the trial that the Plaintiff's entire case was based on the claim that Miles C. Cone conveyed to his wife Caroline F. Cone 106.5 of the 320 acres acquired by the deed of Adam Miles Cone in 1888. As a result of this examination, Deponent has found upon the public records of Dorchester County two documentary evidences that Miles C. Cone did not convey to his wife, Caroline F. Cone, [fol. 110] any portion of this 320 acres. Attached hereto and designated Exhibit "A" is a certified copy of a Mortgage from Miles Cone to J. H. Cone dated the 17th f July, 1928, and recorded in the Office of the Clerk of Court for Dorchester County in Book of Mortgages 34, Page 126. This Mortgage gives a description of the mortgaged property identical to the description set forth in the Deed from Adam Miles Cone to Miles C. Cone with a sentence at the end of the description reading as follows: "The same being recorded Walterboro, S. C. in Book 7, page 282, conveyed to me by A. Miles Cone." The other instrument showing evidence of ownership is a Deed of Conveyance from Miles Cone to Owen C. Cone (the witness who testified that Miles Cone conveyed 106.5 acres to Caroline F. Cone out of this same 320 acre tract), dated the 11th of January 1932 and recorded in the office of the Clerk of Court for Dorchester County in Book of Conveyances 53, Page 227. In this Deed, the description varies somewhat from the earlier records, but clearly indicates that it is the same 320 acres and, so as to avoid all doubt, completes the description by adding a sentence reading as follows: "Being the same lands conveyed to Miles Cone by A. M. Cone by Deed dated September 18, 1888, recorded October 6, 1888, in the R. M. C. Office for Colleton County, S. C., in Book 7, at Page 282, but now being in Dorchester County, S. C., the said lands having been described in the said Deed as two tracts, one of 248 acres and the other of 72 acres, both tracts adjoining and forming one body, containing 320 acres, more or less.". A certified copy of this Deed is hereto attached and marked Exhibit "B." It is especially noteworthy that both of these instruments [fol. 111] contain the warranties of Miles Cone to the effect that he has good title to these 320 acres so de-

scribed, many years after the mythical and unrecorded deed of conveyance for 106.5 acres therefrom to his wife, Caroline F. Cone.

During the course of the trial, both A. N. Cone and his brother, Owen Cone, testified that their mother, Caroline F. Cone, owned no property whatsoever in Burns Township other than the property in dispute in this action and a certificate of the Auditor of Dorchester County was introduced to show that she returned and paid taxes in Burns Township or District on 55 acres in 1917 and on 50 acres in 1918, 1919 and 1920. On cross examination, it was denied by A. N. Cone that he had knowledge of any property acquired by his mother from a person by the name of Tumblestone, or from anyone by the name of Viard. Since the trial, an examination of the records of Dorchester County has disclosed that by Deed dated the 2nd day of December, 1916, recorded in the Office of the Clerk of Court for Dorchester County in Book of Conveyances 26, Page 41, Caroline F. Cone conveyed to Andrew N. Cone land described as "All that piece, parcel or tract of land, situate, lying and being in Burns Township in the County of Dorchester and State of South Carolina, Measuring and Containing 100 acres, more or less, being one-half (½) of a tract of 200 acres, more or less, formerly of Annie L. Tumbleston . . ." On the same day, by another Deed, Caroline F. Cone conveyed to J. M. Cone the 100 acre balance of the 200 acre tract. These two Deeds refer to the sources of title as being Mrs. [fol. 112] Annie L. Tumblestone, Rivers Nathaniel Tumblestone, Noel Tumblestone and Ida Matilda Viard, all of which will appear by reference to certified copies of these two Deeds attached hereto and marked, respectively, Exhibit "C" and Exhibit "D."

A further check of the records of Dorchester County discloses that in the year 1907 Deeds were executed and recorded whereby Rivers Nathaniel Tumblestone, Mrs. Annie L. Tumblestone, Noel Tumblestone and Ida Matilda Viard conveyed to Mrs. C. F. Cone, various parcels of land in Burns Township, containing in the aggregate 209 acres. Certified copies of these Deeds are hereto attached marked, respectively, Exhibit "E," Exhibit "F," Exhibit "G" and Exhibit "H." The records of Dorchester County also disclose that by Deed dated De-

cember 30, 1909, recorded in the Office of the Clerk of Court for Dorchester County in Book of Conveyances 15, Page 25, there is a Deed from Charles H. Tumblestone to Mrs. C. F. Cone for 50 acres of land in Burns Township. A certified copy of this deed is hereto attached, marked Exhibit "I." The records do not disclose any conveyances by Caroline F. Cone with respect to the Tumblestone tract after it was acquired by her, except for the conveyances to Andrew N. Cone and J. M. Cone above mentioned.

Upon the tax records in the possession of the Auditor of Dorchester County, there appear for the years 1915 and 1916 on pages captioned "Burns S. D. No. 11," entries showing 255 acres to be taxable in the name of C. F. Cone, 69 acres in the name of A. N. Cone and no property in the name of J. M. Cone. Upon the similar records for 1917 and 1918 there are entries showing 55 acres (50 acres in 1918) in the name of C. F. Cone, [fol. 113] 100 acres in the name of Joe Cone and 169 acres in the name of Andrew N. Cone. A certificate of the Auditor of Dorchester County is hereto attached and marked Exhibit "J."

The deeds and tax records make it very clear that Caroline F. Cone acquired 255 (or 250) acres of the Tumblestone lands in Burns Township prior to 1915 and that she divided 200 acres of these lands between Andrew N. Cone and J. M. Cone in the latter part of 1916. There can be no doubt but that the property taxed as 55 acres in 1917 and as 50 acres in 1918, 1919 and 1920 in the name of Caroline F. Cone in Burns Township was a part of the Tumblestone tract and had no relation to the property at issue in this action, despite the testimony given on behalf of the Plaintiff to try to show the contrary. The deed to Andrew N. Cone also disproves his sworn assertion that he had no knowledge of lands owned by his mother, Caroline F. Cone, in Burns Township other than the 106.5 acres involved in this action.

Charles W. Waring.

Sworn to before me this 26th day of July, A. D. 1945.
S. P. Dent, Notary Public for South Carolina. (Seal)

[fol. 114] EXHIBIT "A" TO AFFIDAVIT

STATE OF SOUTH CAROLINA,
County of Dorchester.

To All to Whom These Presents May Concern:

I, Miles Cone of Dorchester County, in the State aforesaid, send Greeting:

Whereas I the said Miles Cone am indebted to J. H. Cone in and by my certain Bond or obligation, bearing date this 17th day of July, 1928, for the principal sum of Three Hundred and Seventy no/100 ($370.00) Dollars conditioned to pay to said J. H. Cone his certain Attorneys, Executors, Administrators, or Assigns the sum aforesaid with interest from the date thereof, at the rate of 8% per cent per annum, payable annually, until the said principal sum shall have been fully paid; to make all payments both principal and interest, in United States Gold Coin of the present standard of weight and fineness, or its equivalent, at the option of the obligee; that interest not paid when due shall become a part of the principal sum and bear interest at the rate of 8% per cent per annum until such interest and principal shall have been fully paid; to pay all costs, expenses, disbursements and Attorney's fees incurred in the collection thereof; the Attorney's fees to be equal to 25% per cent of the whole amount due thereon at the time of the payment thereof; all of which in and by said bond and the conditions and covenants therein contained reference being thereunto had will more fully appear.

Now, Know All Men, that I the said Miles Cone in consideration of the said debt and bond aforesaid and for the [fol. 115] better securing the payment thereof, and the performance of the covenants herein contained, to the said J. H. Cone according to the conditions of the said bond, and also in consideration of the further sum of three dollars to me the said Miles Cone in hand well and truly paid by the said J. H. Cone at and before the sealing and delivery of these Presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the said J. H. Cone

All of that piece or parcel of land situated in St. Paul's Parish Dorchester County and State afore-

said Containing Two hundred and forty eight acres more or less, and bound*ing* on the North by lands of A. S. J. Perry, on the South by the Estate of Perry, on the West by lands of Franklin Cone, and on the East by lands of John Cone, formerly known as the Josiah Perry Estate.

Also all of that piece of land lying and being in St. Pauls Parish Dorchester County State aforesaid Containing Seventy two acres more or less. Bounded as follows: on the North by lands of A. S. J. Perry, on the South by lands of A. Miles Cone, on the East by above mentioned tract of 248 acres and on the West by Franklin Cone formerly A. Willis but conveyed to A. M. Cone. The same being recorded Walterboro, S. C. in Book 7 page 282 conveyed to me by A. Miles Cone.

Together with all and singular the rights, members, Hereditaments and Appurtenances to the said premises [fol. 116] belonging, or in anywise incident or appertaining.

To Have and to Hold all and singular the said premises before mentioned unto the said J. H. Cone his Heirs and Assigns forever.

And I do hereby bind myself my Heirs, Executors and Administrators, to warrant and forever defend all and singular the said premises unto the said J. H. Cone, his Heirs and Assigns, against me and my Heirs, and all persons lawfully claiming or to claim the same or any part thereof.

Provided always, nevertheless, and it is the true intent and meaning of the parties to these Presents that if I, the said Miles Cone do, and shall well and truly pay, or cause to be paid unto the said J. H. Cone the said debt or sum of money aforesaid, with the interest thereon, if any shall be due, and shall perform the covenants herein contained, according to the true intent and meaning of said bond and this mortgage, then this Deed of bargain and sale shall cease, determine and be utterly null and void; otherwise it shall remain in full force and virtue.

2: And it is further agreed, that the said Miles Cone shall pay, as the same may become due, all taxes by whatever authority legally imposed upon the property

hereby mortgaged; and in case he shall at any time neglect or fail so to do, then the said J. H. Cone may pay such taxes and reimburse himself for the same, with interest at the rate of 8% per cent per annum and that the same shall stand secured by this mortgage.

3. And it is further agreed, that the said Miles Cone his agents and tenants, shall keep the aforesaid premises in as good order and condition as they now are, and [fol. 117] not commit waste, or cut timber thereon to such an extent as to impair the value of the same as security for the said loan.

4. And it is further agreed, that in case default of payment under any of the conditions of said bond or failure to perform any of the covenants of this mortgage for the space of thirty consecutive days, the whole amount of principal shall become due.

And it is further agreed, that the said Miles Cone shall hold and enjoy the said premises until default of payment, as provided in said bond, or a breach of some of the covenants of this mortgage.

Witness my hand and seal this 17 day of July in the year of our Lord one thousand nine hundred and 28, and in the one hundred and 53 year of the Sovereignty and Independence of the United States of America.

/s/ Miles Cone (Seal).

Signed, Sealed and Delivered in the Presence of /s/ S. B. Hill, T. M. Reeves.

STATE OF SOUTH CAROLINA,
County of Colleton.

Personally appeared before me S. B. Hill and made oath that he saw the within named Miles Cone sign, seal, and as his act and Deed, deliver the within written [fol. 118] Deed, and that he with T. M. Reeves witnessed the execution thereof.

/s/ S. B. Hill.

Sworn to before me this 17 day of July, 1928. /s/ T. M. Reeves (L.S.), Magistrate. Recorded July 18, 3 P. M., 1928.

STATE OF SOUTH CAROLINA,
County of Dorchester.

For value received I J. H. Cone do hereby assign transfer and set over to D. L. Cone his Heirs and Assigns the mortgage of real estate of Miles Cone.

In witness whereof I the said J. H. Cone have hereunto set my hand and seal this the 20th day of December A. D. 1930.

/s/ J. H. Cone.

Signed, Sealed and Delivered in the Presence of: /s/ E. C. Bryant, J. H. Bryant.

STATE OF SOUTH CAROLINA,
County of Dorchester.

Personally appeared before me E. C. Bryant who being duly sworn says that he saw the above named J. H. Cone [fol. 119] sign, seal and as his act and deed deliver the foregoing assignment of mortgage and the debt secured thereby and that he with J. H. Bryant witnessed the execution thereof.

Sworn to before me this 20th day of December A. D. 1930. /s/ J. H. Bryant, Clerk of Court Dor. Co. Satisfied this 16th day of Jan. 1932.

/s/ D. L. Cone.

Witness /s/ L. W. Reeves, Edwin E. Neese

Personally appeared before me L. W. Reeves who being duly sworn says that he saw D. L. Cone sign the Satisfaction of this Mortgage cancelling the debt secured thereby and that he with Edwin E. Neese witnessed the execution thereof.

/s/ L. W. Reeves.

Sworn to before me this 16th day of January, 1932. /s/ T. M. Reeves, Magistrate.

STATE OF SOUTH CAROLINA,
County of Dorchester.

I, J. H. Bryant, Clerk of Court for Dorchester County, South Carolina, do hereby certify that the foregoing is a true copy of a Mortgage from Miles Cone to J. H.

[fol. 120] Cone as recorded in Book of Mortgages 34 at page 126.

J. H. Bryant, Clerk of Court for Dorchester County, S. C.

St. George, S. C., July 25th, 1945.

EXHIBIT "B" TO AFFIDAVIT

STATE OF SOUTH CAROLINA,
County of Dorchester.

Know All Men By These Presents, That I, Miles Cone in the State aforesaid Colleton County in consideration of the sum of Five and no/100 ($5.00) Dollars and love and affection for son to me in hand paid at and before the sealing of these presents by Owen C. Cone in the State of Florida the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the said Owen C. Cone, his heirs and assigns:

All that piece, parcel or tract of land situate, lying and being in Dorchester County, South Carolina, containing three hundred and twenty (320) acres, more or less, and bounded as follows: North by lands of Cooper River Timber Company, formerly J. Lamb Perry: East by lands of Cooper River Timber Company, formerly John Cone: South by lands of Cooper River Timber Company, formerly Jim Perry: West [fol. 121] by lands of Owen C. Cone. Being the same lands conveyed to Miles Cone by A. M. Cone by deed dated September 19, 1888, recorded October 6, 1888, in the R. M. C. office for Colleton County, S. C. in Book 7, at Page 282, but now being in Dorchester County, S. C. the said lands having been described in the said deed as two tracts, one of 248 acres and the other of 72 acres, both tracts adjoining and forming one body containing 320 acres, more or less.

Together with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises, belonging, or in anywise incident or appertaining.

To Have and to Hold, all and singular, the said prem-

ises before mentioned, unto the said Owen C. Cone, his Heirs and Assigns forever.

And I do hereby bind myself and my Heirs, my Executors and Administrators, to warrant and forever defend, all and singular, the said Premises unto the said Owen C. Cone, his Heirs and Assigns, against me and my Heirs, and all other persons lawfully claiming, or to claim the same, or any part thereof.

Witness my Hand and Seal this 11th day of January in the year of our Lord one thousand nine hundred and thirty-two and in the one hundred and fifty-sixth year of the Sovereignty and Independence of the United States of America.

/s/ Miles Cone (L.S.)

Signed, Sealed and Delivered in the Presence of /s/ J. C. Lemacks, Maude Ayer.

[fol. 122] STATE OF SOUTH CAROLINA,
Colleton County.

Personally appeared before me Maude Ayer and made oath that she saw the within named Miles Cone sign, seal and as his act and deed, deliver the within written Deed; and that she with J. C. Lemacks witnessed the execution thereof.

/s/ Maude Ayer.

Sworn to before me, this 11th day of January A. D. 1932. /s/ J. C. Lemacks (Seal), Notary Public for S. C. No Dower. Grantor a widower.

Filed 27 day of January 11 A. M. A. D. 1932, and recorded in Book 53 Page 227.

/s/ J. H. Bryant, R. M. C. or Clerk Court C.P.&G.S. Dorchester County, S. C.

STATE OF SOUTH CAROLINA,
County of Dorchester.

I, J. H. Bryant, Clerk of Court for Dorchester County, South Carolina, do hereby certify that the foregoing is a true copy of a Deed from Miles Cone to Owen C. Cone as recorded in Book of Conveyances 53 at Page 227.

J. H. Bryant, Clerk of Court for Dorchester County, S. C.

St. George, S. C. May 31st, 1945.

[fol. 123] EXHIBIT "C" TO AFFIDAVIT

STATE OF SOUTH CAROLINA,

Know All Men By These Presents, That I, Caroline F. Cone of Burns Township in the County of Dorchester in the State aforesaid for and in consideration of the sum of Five Dollars and other considerations Dollars, to me in hand paid at and before the sealing of these Presents, by Andrew N. Cone in the State aforesaid (the receipt whereof is hereby acknowledged), have granted, bargained, sold, and released, and by these Presents do grant, bargain, sell and release unto the said Andrew N. Cone

All that piece, parcel, lot or tract of land, situate, lying and being in Burns Township in the County of Dorchester and State of South Carolina, Measuring and Containing one hundred Acres more or less, being One half of a tract of Two hundred Acres more or less, formerly the Annie L. Tumbleston lands: Butting and Bounding to the Northwest on lands said to be of the Estate of Rice and now or formerly of Mrs. Lizzie Cooper, to the Northeast and East on lands now or formerly of Dolton and lands now or formerly of J. Lamb Perry, to the South on lands now or formerly of Charles Tumbleston, and to the West on lands of the Estate of Benjamin Sauls known as the Morelands and lands now or late of the Tumbleston estate. The same having such marks, metes, boundaries, delineations and dimensions as a plat of said lands, made by James A. Postell, [fol. 124] Surveyor, on the 11th day of December, 1908, will more fully show. The same having been conveyed to me in various tracts or portions by Mrs. Annie L. Tumbleston by Deed bearing date April 13, 1907, recorded in Clerk of Court's office Dorchester County in Book 10, Page 283: Rivers Nathaniel Tumbleston by Deed dated April 11th, 1907, recorded in Book 10, page 284; by Noel Tumbleston by Deed dated April 27th, 1907, recorded in Book 11, page 50; by Ida Matilda Viard by Deed dated June 21, 1907, recorded in Book 12, page 2.

Together with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

To Have and to Hold, all and singular, the said Premises before mentioned unto the said Andrew N. Cone Heirs and Assigns forever.

And I do hereby bind myself and my Heirs, Executors and Administrators to warrant and forever defend all and singular the said Premises unto the said Andrew N. Cone, his Heirs and Assigns, against me and my Heirs and all other persons lawfully claiming, or to claim, the same or any part thereof.

Witness my Hand and Seal, this Second day of December in the year of our Lord one thousand nine hundred and sixteen and in the one hundred and forty [fol. 125] first year of the Sovereignty and Independence of the United States of America.

/s/ Caroline F. Cone (L.S.).

Signed, Sealed and Delivered in the Presence of /s/ Charlie Radcliffe, W. S. Harmon.

THE STATE OF SOUTH CAROLINA,
Dorchester County.

Personally appeared before me Charlie Radcliffe and made oath that he saw the within named Caroline F. Cone sign, seal and as her act and deed, deliver the within written Deed; and that he with W. S. Harmon witnessed the execution thereof.

Sworn before me, this second day of December A. D. 1916

/s/ Charlie Radliffe.

/s/ S. P. Driggers (L.S.), Notary Public for S. C. (Notarial Seal), Recorded January 20th, 1917.

STATE OF SOUTH CAROLINA,
County of Dorchester.

I, J. H. Bryant, Clerk of Court for Dorchester County, South Carolina, do hereby certify that the foregoing is a [fol. 126] true copy of a Deed from Caroline F. Cone to Andrew N. Cone as recorded in Book of Conveyances 26, page 41.

J. H. Bryant, Clerk of Court for Dorchester County, S. C.

St. George, S. C., July 25th, 1945.

EXHIBIT "D" TO AFFIDAVIT

STATE OF SOUTH CAROLINA,

Know All Men by These Presents, That I, Caroline F. Cone, of Burns Township, in the County of Dorchester in the State aforesaid for and in consideration of the sum of Five Dollars and other considerations to—in hand paid at and before the sealing of these Presents, by J. M. Cone in the State aforesaid (the receipt whereof is hereby acknowledged), have granted, bargained, sold, and released, and by these Presents do grant, bargain, sell and release unto the said J. M. Cone

All that piece, parcel, lot or tract of land situate, lying and being in Burns Township in the County of Dorchester, and State of South Carolina, measuring and containing One hundred (100) acres more or less, being the Southern half of a tract of Two Hundred (200) acres, more or less, formerly the Annie L. Tumbleston land: Butting and Bounding to the North on land said to be of the Estate of Rice and now or formerly of Mrs. Lizzie Cooper, to the Northeast and East on lands now or formerly of Dalton and lands now or formerly of J. Lamb Perry, to the [fol. 127] South on lands now or formerly of Charles Tumbleston, and to the West on lands of Estate of Benjamine Sauls known as the Moore land and lands now or late of the Tumbleston estate. The same having such marks, metes bounds delineations and dimensions, as a plat of said land made by James A. Postell, Surveyor, on the 11th of December, 1908 will more fully show. The same having been conveyed to me in various tracts or portions by Mrs. Annie L. Tumbleston by deed bearing date April 13, 1907, recorded in Clerk of Court's Office Dorchester County in Book 10 page 283, by Rivers Nathaniel Tumbleston by deed dated April 11, 1907, recorded in Book 10, page 284, by Noel Tumbleston by deed dated April 27, 1907 recorded in Book 11, page 50, by Ida Matilda Viard by deed dated June 21, 1907, recorded in Book 12, Page 2.

Together with, all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

To Have and to Hold, all and singular, the said Premises before mentioned unto the said J. M. Cone his Heirs and Assigns, forever.

And I do hereby bind myself and my Heirs, Executors and Administrators to warrant and forever defend all and singular the said Premises unto the said J. M. Cone, his Heirs and Assigns, against me and my Heirs and all other persons lawfully claiming, or to claim, the same or any part thereof.

[fol. 128] Witness my Hand and Seal this second day of December in the year of our Lord one thousand nine hundred and Sixteen and in the one hundred and forty-first year of the Sovereignty and Independence of the United States of America.

/s/ Caroline F. Cone (L.S.)

Signed, Sealed and Delivered in the Presence of /s/ Charlie Radcliffe, W. S. Harmon.

THE STATE OF SOUTH CAROLINA,
Dorchester County.

Personally appeared before me Charlie Radcliffe and made oath that he saw the within named Caroline F. Cone sign, seal and as her act and deed, deliver the within written Deed; and that he with W. S. Harmon witnessed the execution thereof.

/s/ Charlie Radcliffe.

Sworn before me, the second day of December A. D. 1917. /s/ S. P. Driggers (L.S.) Notary Public for S. C. Recorded August 17th, 1917.

STATE OF SOUTH CAROLINA,
County of Dorchester.

I, J. H. Bryant, Clerk of Court for Dorchester County, South Carolina, do hereby certify that the fore-[fol. 129] going is a true copy of a Deed from Caroline F. Cone to J. M. Cone as recorded in Book of Conveyances 26, page 242.

/s/ J. H. Bryant, Clerk of Court for Dorchester County, S. C., Official Seal.

St. George, S. C. July 25th, 1945.

EXHIBIT "E" TO AFFIDAVIT

STATE OF SOUTH CAROLINA,
County of Dorchester.

Know All Men by These Presents, That I, Rivers Nathaniel Tumblestone of Burns Township, County of Dorchester (formerly Colleton County) in the State aforesaid in consideration of the sum of Fifty Dollars to me in hand paid at and before the sealing of these Presents, by Mrs. C. F. Cone, wife of Miles Cone, of Dorchester County in the State aforesaid (the receipt whereof is hereby acknowledged) have granted, bargained, sold and released, and by these Presents do grant, bargain sell and release unto the said Mrs. C. F. Cone

50 acres of land in all that tract of land, lying, situated and being in the County of Dorchester, formerly Colleton County, in the State aforesaid Containing Four Hundred (400) acres, be the same more or less and bounded as follows to wit: On the North by lands said to belong to Mrs. Lizzie Cooper wife of [fol. 130] Hon. M. R. Cooper; on the East by lands said to belong to J. Lamb Perry; on the South by lands said to belong to Mrs. Moore, known as the H. T. Spell property and on the West by lands said to belong to the Estate of Boyd now owned by George H. Muckenfuss, as will more fully show by reference to a plat of the said tract of land and by a conveyance made by Mrs. Annie L. Tumblestone to Mrs. C. F. Cone and myself of date April, 1907.

Togther with all and singular the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

To Have and to Hold, all and singular the said premises above mentioned unto the said Mrs. C. F. Cone, her Heirs and Assigns forever.

And I do hereby bind myself and my Heirs, Executors and Administrators, to warrant and forever defend all and singular the said premises unto the said Mrs. C. F. Cone, her Heirs and Assigns, against me and my Heirs or any person or persons lawfully claiming, or to claim the same, or any part thereof.

Witness my hand and seal this 11th day of April, in the year of our Lord one thousand nine hundred and

seven and in the one hundred and 31st year of the Sovereignty and Independence of the United States of America.

/s/ Rivers Nathaniel Tumblestone, (L.S.)

Signed, Sealed and Delivered in the Presence of /s/ Miles Cone, J. B. Bivens.

[fol. 131] STATE OF SOUTH CAROLINA,
Dorchester County.

Personally appeared before me Miles Cone and made oath that he saw the within named Rivers Nathaniel Tumblestone sign, seal and as his act and deed, deliver the within written Deed; and that he with J. D. Bivens witnessed the execution thereof.

/s/ Miles Cone.

Sworn to before ~~me this~~ 11th day of April, A. D. 1907. /s/ John D. Bivens (L.S.), Notary Public for S. C. Recorded April 23rd, 1907.

STATE OF SOUTH CAROLINA,
County of Dorchester.

I, J. H. Bryant, Clerk of Court for Dorchester County, South Carolina, do hereby certify that the foregoing is a true copy of a Deed from Rivers Nathaniel Tumblestone to Mrs. C. F. Cone, as recorded in Book of Deeds No. 10, Page 284.

/s/ J. H. Bryant, Clerk of Court for Dorchester County, S. C., Official Seal.

St. George, S. C. July 25th, 1945.

[fol. 132] EXHIBIT "F" TO AFFIDAVIT

STATE OF SOUTH CAROLINA,
County of Dorchester.

Know All Men by These Presents, That I, Mrs. Annie L. Tumblestone, of Burns Township, Dorchester County (formerly Colleton County), in the State aforesaid in consideration of the sum of One hundred Dollars to me in hand paid at and before the sealing of these Presents, by

Rivers Nathaniel Tumblestone and Mrs. C. F. Cone of the County of Dorchester in the State aforesaid (the receipt whereof is hereby acknowledged) have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the said Rivers Nathaniel Tumblestone and Mrs. C. F. Cone

One Hundred acres of land in all that tract of land situate, lying and being in the County of Dorchester, State aforesaid containing four (400) hundred acres, more or less, and bounded as follows to wit: On the North by lands said to belong to Mrs. Lizzie Cooper, wife of Hon. M. R. Cooper; on the East by lands said to belong to J. Lamb Perry; on the South by lands said to belong to Mrs. Moore known as H. T. Spell property; and on the West by lands said to belong to Estate Boyd, now owned by George H. Muckenfuss, as will more fully show by reference to a plat of the said tract of land.

Together with all and singular the Rights, Members, Hereditaments and Appurtenances to the said [fol. 133] Premises belonging, or in anywise incident or appertaining.

To Have and to Hold all and singular the said premises above mentioned unto the said Rivers Nathaniel Tumblestone and Mrs. C. F. Cone, their Heirs and Assigns forever.

And I do hereby bind myself and my Heirs, Executors and Administrators, to warrant and forever defend all and singular the said premises unto the said Rivers Nathaniel Tumblestone and Mrs. C. F. Cone, their Heirs and Assigns, against me and my Heirs or any person or persons lawfully claiming, or to claim the same, or any part thereof.

Witness my hand and seal this 13th day of April in the year of our Lord one thousand nine hundred and seven and in the one hundred and 31st year of the Sovereignty and Independence of the United States of America.

/s/ Mrs. Annie L. Tumblestone (L.S.), X—her mark

Signed, Sealed and Delivered In the Presence of /s/ Miles Cone, G. H. Muckenfuss

STATE OF SOUTH CAROLINA,
Dorchester County.

Personally appeared before me Miles Cone and made oath that he saw the within named Mrs. Annie L. Tumblestone sign, seal and as her act and deed, deliver [fol. 134] the within written Deed; and that he with George H. Muckenfuss witnessed the execution thereof.

/s/ Miles Cone.

Sworn to before me this 15th day of April, A. D. 1907. /s/ John D. Bivens (L.S.), Notary Public for S. C. Recorded April 23rd, 1907

STATE OF SOUTH CAROLINA,
County of Dorchester.

I, J. H. Bryant, Clerk of Court for Dorchester County, South Carolina, do hereby certify that the foregoing is a true copy of a Deed from Miles Cone to J. H. Cone as recorded in Book of Deeds 10, at Page 283.

J. H. Bryant, Clerk of Court for Dorchester County, S. C.

St. George, S. C., July 25th, 1945.

EXHIBIT "G" TO AFFIDAVIT

NOEL TUMBLESTON TO MRS. C. F. CONE

THE STATE OF SOUTH CAROLINA:

Know All Men by These Presents, That I, Noel Tumbleston of the City of Charleston S. C. in the State aforesaid Farmer, in consideration of the sum of [fol. 135] fifty Dollars to me in hand at and before the sealing of the presents, by Mrs. C. F. Cone, of Dorchester County, in the State aforesaid, the receipt whereof is hereby acknowledged, have granted bargained sold and released and by these presents do grant, bargain sell and release unto the said—Mrs. C. F. Cone—

All my right title claim and interest consisting of fifty (50) acres, be the same more or less, in all that piece parcel or tract of land, lying being and situate in Burns Township Dorchester County, formerly Colleton County, in the State aforesaid Measuring

and Containing Four hundred (400) acres, be the same more or less, and bounded as follows, on the North by lands said to belong to Mrs. Lizzie Cooper, wife of Hon. M. R. Cooper; East on lands said to belong to J. Lamb Perry; on the South by lands said to belong to Mrs. Moore, formerly owned by H. F. Spell and on the West by lands said to belong to Estate of Boyd now owned by George H. Muckenfuss, as will more fully appear by a reference to a plat of the said property.

Together with all and singular the Rights, Members, Hereditaments and Appurtenances, to the said premises belonging or in anywise incident or appertaining.

To Have and to Hold all and singular the said premises before mentioned unto the said Mrs. C. F. Cone, her Heirs and Assigns forever.

And I do hereby bind myself and my Heirs, Executors and Assigns, to warrant and defend all and singular the said premises unto the said Mrs. C. F. Cone, and her [fol. 136] Heirs and Assigns against me and my Heirs or any person or persons lawfully claiming or to claim the same or any part thereof.

Witness my Hand and Seal this 27th day of April in the year of our Lord one thousand nine hundred and seven and in the one hundred and thirty-first year of the Sovereignty and Independence of the United States of America.

/s/ Noel Tumbleston.

Signed, Sealed and Delivered in the Presence of /s/. D. M. Winter, E. D. Knight.

The State of South Carolina,
Dorchester County.

Personally appeared before me D. M. Winter and made oath that he saw the within named Noel Tumbleston sign, seal and as his Act and Deed, deliver the within written Deed; and that he with E. D. Knight witnessed the execution thereof.

/s/ D. M. Winter.

Sworn to before me this 27th day of April A. D. 1907. T. M. Finucan, Notary Public S. C. (Notarial Seal).

[fol. 137] THE STATE OF SOUTH CAROLINA,
Dorchester County.

I, John D. Bivens, a Notary Public for S. C. do hereby certify unto all whom it may concern that Mrs. Rosa Tumbleston, the wife of the within named Noel Tumbleston, did this day appear before me and upon being privately and separately examined by me, did declare that she does freely voluntarily, and without any compulsion, dread, or fear of any person or persons whomsoever, renounce, release and forever relinquish unto the within named Mrs. C. F. Cone, Her Heirs and Assigns, all her interest and estate, and also all right and also all her right and claim of Dower, of, in or to all and singular the premises within mentioned and released.

Given under my Hand and Seal this 16th day of May *Anno Domini* 1907.

Mrs. Rosa X Tumbleston.

/s/ John D. Bivens (L.S.), Notary Public for S. C. Recorded May 20th, 1907.

STATE OF SOUTH CAROLINA,
County of Dorchester.

I, J. H. Bryant, Clerk of Court for Dorchester County, South Carolina, do hereby certify that the foregoing is a true copy of a Deed from Noel Tumbleston to Mrs. [fol. 138] C. F. Cone as recorded in Book of Conveyances 11, page 50.

/s/ J. H. Bryant, Clerk of Court for Dorchester County, S. C., (Official Seal).

St. George, S. C., July 25th, 1945.

EXHIBIT "H" TO AFFIDAVIT

STATE OF SOUTH CAROLINA,
County of Dorchester.

Know All Men by These Presents, That I, Ida Matilda Viard of Colleton County in the State aforesaid in consideration of the sum of Fifty Dollars to me in hand paid at and before the sealing of these Presents, by Mrs.

C. F. Cone of the County of Dorchester in the State aforesaid (the receipt whereof is hereby acknowledged) have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the said Mrs. C. F. Cone of Dorchester County,

> All my right, title, claim and interest consisting of fifty (50) acres, be the same more or less, in all that piece, parcel or tract of land lying, being and situated in Burns Township, Dorchester County, formerly Colleton County, in the State aforesaid—measuring and containing Four (400) hundred acres, be the same more or less, and bounded as follows: On the North by lands said to belong to Mrs. Lizzie Cooper, wife of Hon. M. R. Cooper, on the East by lands [fol. 139] said to belong to J. Lamb Perry, on the South by lands said to belong to Mrs. Moore and formerly owned by Henry T. Spell, and on the West by lands said to belong to Estate of Boyd, now owned by George H. Muckenfuss, as will more fully appear by reference to a "plat" of the said property.

Together with all and singular the Rights, Members Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

To Have and to Hold, all and singular the said Premises, before mentioned unto the said Mrs. C. F. Cone, her Heirs and Assigns forever.

And I do hereby bind myself and my Heirs, Executors and Administrators, to warrant and forever defend all and singular the said Premises unto the said Mrs. C. F. Cone, her Heirs and Assigns, against me and my Heirs or any person or persons lawfully claiming, or to claim the same, or any part thereof.

Witness my Hand and Seal, this 21st day of June in the year of our Lord one thousand nine hundred and seven and in the one hundred and 31st year of the Sovereignty and Independence of the United States of America.

/s/ Ida Matilda Viard (L.S.)

Signed, Sealed and Delivered in the presence of /s/ Miles Cone, /s/ C. H. Tumbleston, X—his mark

[fol. 140] THE STATE OF SOUTH CAROLINA,
Dorchester County.

Personally appeared before me Miles Cone and made oath that he saw the within named Ida Matilda Viard sign, seal and, as her act and deed, deliver the within written Deed; and that he with C. H. Tumbleston witnessed the execution thereof.

/s/ Miles Cone.

Sworn before me, this 21st day of June A. D. 1907. (L.S.) J. D. Bivens (Seal), Notary Public for S. C. Recorded July 1st, 1907.

STATE OF SOUTH CAROLINA,
County of Dorchester.

I, J. H. Bryant, Clerk of Court for Dorchester County, South Carolina, do hereby certify that the foregoing is a true copy of a Deed from Ida Matilda Viard to Mrs. C. F. Cone as recorded in Book of Conveyance 12, page 2.

/s/ J. H. Bryant, Clerk of Court for Dorchester County, S. C., Official Seal.

St. George, S. C. July 25th, 1945.

[fol. 141] EXHIBIT "I" TO AFFIDAVIT

STATE OF SOUTH CAROLINA,
Dorchester County.

Know All Men by These Presents, That I, Charles H. Tumbleston of Burns Township, County of Dorchester formerly Colleton County, in the State aforesaid Farmer in consideration of the sum of One Hundr 1 Dollars to me in hand paid at and before the sealing of these Presents, by Mrs. C. F. Cone of Dorchester County, in the State aforesaid (the receipt whereof is hereby acknowledged), have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the said Mrs. C. F. Cone

All my right title claim and interest in the estate of Mrs. Annie L. Tumbleston measuring and containing fifty acres (50) acres, more or less, In all that tract of land lying being and situated, in the County of Dorchester formerly Colleton County, in the

State aforesaid, Measuring and Containing four (400) hundred acres, be the same more or less, and bounded as follows: On the North by lands said to belong to Mrs. Lizzie Cooper, wife of Hon. M. R. Cooper; On the East by lands said to belong—J. Lamb Perry; On the South by lands said to belong to Mrs. Moore known as the H. T. Spell property, and on the West by lands said to belong to the Estate of Boyd Bros, Now owned by Geo. H. Muckenfuss, as will more fully show by reference to a plat of the lands.

[fol. 142] Together with, all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

To Have and to Hold, all and singular, the said Premises before mentioned unto the said Mrs. C. F. Cone, her Heirs and Assigns forever.

And I do hereby bind myself and my Heirs, Executors and Administrators to warrant and forever defend all and singular the said Premises unto the said Mrs. C. F. Cone, her Heirs and Assigns against me and my Heirs or any person or persons lawfully claiming, or to claim the same, or any part thereof.

Witness my Hand and Seal, this 30th day of December in the year of our Lord one thousand nine hundred and nine, and in the one hundred and 34th year of the Sovereignty and Independence of the United States of America.

/s/ Charles H. Tumbleston (L.S.), X—his mark.

Signed, Sealed and Delivered in the Presence of /s/ A. N. Cone, J. D. Bivens.

The State of South Carolina,
Dorchester County.

Personally appeared before me A. N. Cone and made oath that he saw the within named Charles H. Tumbleston sign, seal and as his act and deed, deliver the within [fol. 143] written Deed; and that he with J. D. Bivens witnessed the execution thereof.

/s/ A. N. Cone.

Sworn before me, this 30th day of December A. D. 1909.
/s/ Jno. D. Bivens (Seal), Notary Public S. C.

THE STATE OF SOUTH CAROLINA,
Dorchester County.

I, John D. Bivens a Notary Public S. C. do hereby certify unto all whom it may concern, that Mrs. F. L. Tumbleston the wife of the within named Charles H. Tumbleston did this day appear before me and, upon being privately and separately examined by me, did declare that she does freely, voluntarily, and without any compulsion, dread or fear of any person or persons whomsoever, renounce, release and forever relinquish unto the within named Mrs. C. F. Cone, her Heirs and Assigns all her interest and estate, and also all her right and claim of Dower, of, in, or to all and singular the premises within mentioned and released.

Given under my hand and seal, this 30th day of December *Anno Domini* 1909.

/s/ Fannie L. Tumbleston (L.S.)

/s/ Jno. D. Bivens (L.S.), Notary Public S. C. Recorded Jan. 3rd, 1910.

[fol. 144] STATE OF SOUTH CAROLINA,
County of Dorchester.

I, J. H. Bryant, Clerk of Court for Dorchester County, South Carolina, do hereby certify that the foregoing is a true copy of a Deed from Charles H. Tumbleston to Mrs. C. F. Cone as recorded in Book of Conveyance 15, page 26.

/s/ J. H. Bryant, Clerk of Court for Dorchester County, S. C., Official Seal.

St. George, S. C. July 25th, 1945.

EXHIBIT "J" TO AFFIDAVIT

STATE OF SOUTH CAROLINA,
County of Dorchester.

CERTIFICATE

I, the undersigned, H. J. Patrick, Auditor for Dorchester County, South Carolina, do hereby certify that the following appears upon the tax records under my

supervision and care in the County Court House of Dorchester County:

1915	Burns School District No. 11	Mrs. C. F. Cone	255 acres Pd
1916	" " " "	"	" "
1917	" " " "	"	55 acres "
1918	" " " "	"	50 acres "
1915	Burns School District No. 11	Andrew M. Cone	69 acres Pd
1916	" " " "	"	" "
1917	" " " "	"	169 acres "
1918	" " " "	"	" "
1915	Burns School District No. 11	(No entry for J. M. or Joe Cone)	
1916	" " " "	"	"
1917	" " " "	Joe Cone	100 acres Pd
1918	" " " "	J. M. Cone	" "

[fol. 145] Given under my hand and seal at St. George, South Carolina, this 25th day of July, 1945.

/s/ H. J. Patrick. H. J. Patrick, as Auditor of Dorchester County, South Carolina.

Mr. C. W. Waring, Charleston, S. C.

Dear Mr. Waring:

Please notice notations above the years 1915-16 on the tax books was C. F. Cone, In 1915-16 was Andrew M., 1917 was Andrew N.—1918 was A. N.—1918 was J. M. Hoping this will be the required information.

Sincerely yours, /s/ H. J. Patrick.

STATE OF SOUTH CAROLINA,
County of Charleston.

Personally appeared before me Charles W. Waring who, being duly sworn, deposes and says as follows:

I am one of the attorneys for the defendant in the above entitled cause.

Within ten days after the date of the trial herein I went to St. George, South Carolina and made a further examination of the public records for the purpose of discovering whether any documentary or record evidence existed to substantiate or to disprove that Miles C. Cone conveyed to Caroline F. Cone the property which is the subject of this action. The reason for this addi-
[fol. 146] tional search was to learn the true situation concerning this surprising oral and unsubstantiated evi-

dence offered by the plaintiff at the trial to show the basis for his ownership of the property and without which testimony he cannot recover in the action. It was as a result of this examination that there was discovered the new evidence mentioned in the affidavit and shown by the exhibits thereto attached.

On May 29, 1945 this deponent requested Mrs. Walter Wallace, the Court Stenographer in this trial, to furnish as quickly as possible a copy of the transcript of the record therein. By reason of an accumulation of work, or from some other cause, Mrs. Wallace did not deliver this transcript of record until July 11, 1945 and hence deponent was not able to complete preparations for a motion for new trial until this time.

Deponent has used all due diligence in attempting to bring before the Court the newly discovered evidence mentioned and shown by the affidavit and exhibits hereto attached.

Charles W. Waring.

Sworn to before me this 26th day of July, 1945. Clarence B. Pearce (L. S.), Notary Public for South Carolina

---

OPINION AND ORDER

In the above entitled cause defendant has moved for a new trial upon the ground of newly discovered evidence in accordance with Rule 59 (b) of the Rules of [fol. 147] Civil Procedure. The matter was considered at a single hearing upon motion to grant leave and also upon the merits. I have carefully examined the grounds of the motion, the affidavits filed and have heard arguments, especially on the matter of whether the defendant has shown due diligence.

This case was originally instituted in the Court of Common Pleas for Colleton County and was removed to the federal court because of diversity of citizenship. After a preliminary motion, an amended complaint and an answer was filed; and thereafter pretrial conferences were held in January 1945. At one of these conferences it was agreed that the deed of Caroline F. Cone to A. N. Cone (recorded September 18, 1920, in Book

35, page 288, Dorchester County), should be admitted in evidence without further proof and the deed was left on file with the Clerk. This gave information as to the alleged source of title of the plaintiff. Counsel also agreed that they would meet at St. George, S. C. (the county seat of Dorchester County), and together check over the records pertaining to tax payments and other matters affecting the property in litigation. The case was not tried at the January term of court owing to the illness of the plaintiff, but it was then announced that it would be definitely tried at the May term. On May 21st the case was commenced before a jury and plaintiff's testimony was concluded that day and the defendant introduced certain testimony. The next day the defendant continued with its testimony and the case was concluded in the afternoon and resulted in a verdict of $15,000.00 for the plaintiff. It will be noted that in the motion for a new trial the defendant claims that it [fol. 148] was taken by surprise by certain evidence introduced by the plaintiff as to his title. The defendant, however, was fully cognizant of the fact that the plaintiff claimed through a conveyance from his mother, Caroline F. Cone, since that deed was actually offered in evidence at the pretrial conference. The defendant was also on notice that the plaintiff intended to introduce a deed of A. Miles Cone to Miles Cone dated September 19, 1888. At the trial testimony was introduced as to a lost deed conveying the property from Miles Cone to Caroline F. Cone, and the plaintiff claimed that her source of title was the deed above referred to. The defendant now states that it was taken by surprise and thought that this deed was to be introduced for other purposes and this is given as an excuse for not examining the records of Dorchester County to ascertain conveyances to and from the members of the Cone family, and particularly conveyances out of Caroline F. Cone.

It would appear to me that when this suit was instituted and when the defendant was put on notice that the plaintiff was basing his title upon an alleged deed from his mother, Caroline F. Cone, which was on record, and of which it had full knowledge, that the barest caution would have called for a complete examination of all real estate transactions of Caroline F. Cone, not only for

property going into her, but for property conveyed out by her. There is no allegation or showing that these records were difficult to search or that they were not properly indexed or could not be found. There is no witness who was then absent and now located who knew of these things and called attention to them. All of the information was stored in the records of Dorchester County and the defendant being put on notice that the [fol. 149] plaintiff would claim title through Caroline F. Cone failed to check the records as to her. It appears to me that the search made of the records ten days after the trial should have been made many months before the trial and I do not find that due diligence was exercised.

In defendant's argument much was said as to the tax records in the Auditor's office. These records of course are not convincing proof as to title, though they throw some collateral light on the subject. As a matter of fact, all of the testimony as to title was vague and uncertain. The defendant itself attempted to prove title and yet there was a hiatus of many years duration wherein this property did not appear in its name on the tax books. In the defendant's attempt to prove title its showing of the acreage it obtained did not at all coincide with that shown on the plat. The surveyor who made the compiled plat of this and other contiguous properties was not called although there was no showing that he could not be located.

As a matter of fact, as above stated, the matter of title was not clearly proved by either plaintiff or defendant and the main point argued to the jury was that of possession. And that in my opinion was the most important point in the case because the cause of action was based primarily upon an alleged trespass on the property which the plaintiff claimed was in his possession.

It is true that this evidence now shown, if introduced at the trial, should have been helpful to the defendant since it would have rendered more doubtful the proof of legal title by the plaintiff. But plaintiff did not have to prove perfect legal title. He could rely on legal possession. The main point submitted to the jury was [fol. 150] who was in lawful possession, and there was conflicting evidence.

In almost any case counsel can review the trial and

find where a stronger case might have been made and additional evidence might have been found. And that is true here. However, all of the facts now presented could readily have been found before the trial. If afterthoughts are to set aside verdicts there will be no end of litigation.

I am of the opinion that the defendant has failed to come within the rule of the showing of due diligence and the motion for a new trial will, therefore, be refused. Accordingly, it is

Ordered, that the motion for a new trial in the above entitled cause be and the same is hereby refused.

J. Waties Waring, United States District Judge.

Charleston, S. C., August 8, 1945.

[fols. 151-154] NOTICE OF APPEAL

Notice is hereby given that West Virginia Pulp and Paper Company, Defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Fourth Circuit from the final judgment entered in this action on June 5, 1945, and from the Order of the Honorable J. Waties Waring, United States District Judge, refusing the Defendant's motion for a new trial on the ground of newly discovered evidence, which said Order was filed in this cause on August 8, 1945.

D. A. Brockinton, Charles W. Waring, Waring & Brockinton, Attorneys for Defendant.

[fol. 155] **Appendix to Brief of Appellee**

Excerpts of Testimony of Witnesses

Portion of Direct Examination of JOHN D. HARRISON:

By Mr. Unger:

Q. How old are you?

A. Sixty-one (61). I was born on the place called Joe Ioor Waring. It was owned by the heirs of J. Ioor Waring and was originally bought by Mr. J. Lamb Perry.

Q. Is that plantation joining this 106 acres?
A. The canal was the dividing line.
Q. A canal was the dividing line?
A. It was wider between ..... Mr. Perry and Mr. Cone.
Q. A canal runs down by this tract of 106 acres?
A. Yes, sir.
Q. Is any name given, by hunters, for this section?
A. Raccoon Drive.
Q. Raccoon drive is along this canal?
A. Yes, sir.
Q. What kind of land is this 106 acres?
A. All swamp land.
Q. Is there any cultivated, any fields?
A. No, sir.
Q. Is there any place for anybody to live?
A. No, sir.
Q. That was Raccoon Drive and a canal runs through the center. How long is that canal?
A. I don't know, quite a good bit, I couldn't tell you exactly.
Q. The Waring plantation came down to this canal? Did this Waring ever go across that canal?
A. Not to my recollection.
Q. How long have you been living there?
A. I lived there—I moved off in 1915 or 1916, I ain't directly sure which one. I didn't take it down, I lived the balance of my life up to 1915. I rented this plantation from the Warings and Perry got it and I rented it from him.
Q. Do you know when you were born on that plantation?
A. In 1884.
Q. You knew Mr. J. Lamb Perry?
A. Really good.
Q. And he conveyed the Waring Plantation to the West Virginia Pulp & Paper Company?
A. Yes, sir.
Q. Were you ever hunting in there with Mr. Perry?
A. Yes, sir.
[fol. 156] Q. Did he ever make any statement to you concerning his holdings?

Objection by Mr. Waring: I object to that.
The Court: Stop. What is your purpose?

Mr. Unger: I want to ask if Mr. Perry, at the time he owned the land made any statements with reference to where he owned the land to, where his lines were.

The Court: What is the competency.

Mr. Unger: The statement of a former owner as to where a boundary was.

Mr. Waring: Your Honor, J. Lamb Perry is long since deceased and there is no way in which he could be consulted as to what he said and statements made by him prior to his death are utterly incompetent.

Q. John, when you rented this farm from Mr. Perry where did he tell you the line went?

A. To the canal.

Q. It went to the canal?

A. Yes, sir.

Q. Now, during the time you rented from the Warings and the time you rented from J. Lamb Perry have you ever heard of the Waring tract going across the south of that canal?

A. No, sir.

Q. Do you know whose land was south of that canal?

A. Whose land was on the south side? Now directly I couldn't say whose own, it was called "Cone Property". To know the distinction of each Cone, I don't know, there was a bunch of them in there had land down in there.

* * *

Q. How long has that drive been there?

A. Since old slavery time.

* * *

Q. Did you know Mr. Miles Cone?

A. Yes, sir.

Q. Did you ever hunt with him?

A. Yes, sir.

Q. Did Mr. Miles Cone, in your presence, ever make any statements concerning the ownership of this 106 acres?

A. Yes, he said Mr. A. N. Cone owned it.

Objection by Mr. Waring: I object, that is heresay.

The Court: I will let him say, objection overruled. Exception noted.

[fol. 157] By Mr. Waring:

Q. You said, I believe, that you were born on the War-

A. I was, sir.

Q. That plantation was Mr. Joseph Ioor Waring's plantation?

A. Right.

Q. Let me ask you this, what was the name of this plantation, didn't it have a name?

A. Hope Plantation, if I am not badly mistaken.

Q. Do you know how many acres were in the Hope Plantation?

A. Mr. Perry told me 500 acres, more or less in the plantation.

* * *

Portion of Direct Examination of ROBERT WILLIAMS (Colored):

By Mr. Unger:

Q. Robert, how old are you?

A. About 56 or 57, sir.

Q. Where do you live?

A. In Dorchester County.

Q. You live on the Perry plantation?

A. Yes, sir.

Q. That is the former J. Lamb Perry?

A. It was his property I am living on.

Q. You know Mr. J. Lamb Perry?

A. Yes, sir.

Q. You work for him?

A. Yes, sir, oh, yes, sir.

Q. Did you ever hunt with him?

A. Yes, sir.

Q. Do you know where Raccoon Drive is?

A. Yes, sir, I know where it called, it is called Raccoon Drive.

Q. Is there a canal right through that drive?

A. Yes, sir.

Q. You know where J. Lamb Perry's land ended?

Objection by Mr. Waring: I don't think he knows his land.

Q. Do you know where the land of J. Lamb Perry's land ended?

A. Yes, I know a canal is called the line in Raccoon Drive, I don't know neither corner nor neither end, sir.

Q. I am going to ask again as to the statement of this

former owner, J. Lamb Perry, based on the case of *Holden v. Candor.* (Quoting from case).

[fol. 158] The Court: I have allowed you to ask such a question but be very careful in framing it, as to whether Mr. Perry pointed out the lines of his property to him.

Q. How long have you lived on Mr. Perry's plantation?

A. I was born and raised there.

Q. How long did you work for him?

A. Several years, I wouldn't be able to tell you the number of years, but several years.

Q. From the time you were born until he died?

A. I was right there, yes sir.

Q. You are still working for his son, Edward Perry?

A. Yes, sir.

Q. How often did you go hunting with Mr. J. Lamb Perry?

A. About 15 years, I reckon 12 or 15 years.

Q. What did you hunt in Raccoon Drive?

A. Turkeys.

Q. While you were hunting in Raccoon Drive for turkeys, with Mr. J. Lamb Perry, did he make any statement as to where his property went to?

A. He said that canal was his boundary line, that was his boundary line by Burris Willis saying that. Mr. Burris Willis knew the land and told him that. Burris Willis was his foremost hunter.

Q. When you got to that canal did you hunt across it?

A. Well, now, I hunt on his property, but he would always—but this man would always take I and him in there and I knew the way in and out and he always told me to take him to his line and set him down. That is how I knowed that was called the line and I always carried him in there when Burris was absent. I always haul him to the line.

Q. Did——

A. (Interrupting) Burris told him that was his line there and that was the Cone property over there.

Q. That is all you know about it?

A. Yes, sir.

Portion of Direct Examination of FRANK GREEN (Colored)

By Mr. Unger:

Q. Did you know Mr. J. Lamb Perry?
A. Yes, sir.

Q. Did you ever hunt with Mr. J. Lamb Perry?
A. Yes, sir.
[fol. 159] Q. How many years have you been hunting with him?
A. I judge around about, I don't know exactly, but around about 12 or 13 years.
Q. Did you hunt with him in Raccoon Drive?
A. Yes, sir, I have hunted and been with him in Raccoon Drive.
Q. During his hunting expedition did he ever show you where his line was or make any statement?
A. Yes, sir, he told me that canal dam.

Objection by Mr. Waring: Same objection.
The Court: Objection overruled.

A. He carried me to a certain point, a canal dam, he told me that was the dividing of his line, he wouldn't go any further than that.
Q. He didn't go any further, did he say whose land was adjoining on the other side?
A. No, his land was north of that canal and he said Cone property was to the south of that.

Portion of Direct Examination of JULIA ANNE DRIGGERS:

By Mr. Unger:

Q. Have you ever done anything on this 106 acres?
A. Only hunted on it, that is all.
Q. How long have you been hunting on it?
A. I guess around three years, sir.
Q. By whose permission have you been hunting on that land?
A. Mr. Miles Cone gave us permission.
Q. Mr. Andrew Cone's father?
A. Yes, sir, that is right.
Q. Did he tell you whose it was?
A. Yes, he said it belonged to Mr. Andrew Cone.

Portion of Cross Examination of JULIA ANNE DRIGGERS:

By Mr. Waring:

Q. Mr. Miles Cone owned the land?
A. Yes, sir.

Portion of Direct Examination of H. H. JESSEN:

By Mr. Unger:

Q. Mr. Jessen, you are the Sheriff of Dorchester County?
A. Yes, sir.

[fol. 160] Q. Now, in 1942 you had a tax sale for sale of delinquent taxes?
A. Yes, sir.
Q. State whether or not in Burnes School District #22 a tract of 106 acres was sold in the name of A. N. Cone?
A. It was, sir.

A. This is a copy of the advertisement of all the property that was sold at that sale, at that time.

The Court: You sold a tract listed in the name of A. N. Cone?

A. Yes, sir, listed as 106 acres, for 1940 taxes.

Q. By Mr. Unger: And you had that piece of paper with you at the sale?
A. Yes, sir.
Q. Who purchased that?
A. On top of the paper I have a pencil notation of anything bid in HAJ or J then would be to the West Virginia Pulp & Paper Company, and anything AC would go to Ashley Corporation. Mr. Jenkins of the firm of Walker, Walker and Jenkins bid in a lot of property at a lot of sales and I made this notation. I have talked with Howard and he said whenever he bid in for the West Virginia Pulp and Paper Company I would use the HAJ or J, or if he bid in for the Ashley Corporation I would put in AC on top. In selling some of this the space was so limited I would have to abbreviate in order to get it in and this property was in the name of A. N. Cone, it was sold and bid in by Mr. Jenkins, with a "J" by it, which my record shows was the West Virginia Pulp & Paper Company. That is my records, my sale book.

Q. Did you make this record in your office from this?

A. Yes, sir.

Q. Was that property redeemed from the sale?

A. Yes, sir, it was redeemed on the 28th of December, 1942 when it was sold February 2, 1942.

Q. It was redeemed when?

A. December 28, 1942.

Q. What happens when property is redeemed, do you make any record?

A. Yes, sir, when it is redeemed the records goes on the sales books and that money is refunded to the purchaser.

Q. Did you refund money in this instance?

A. Yes, sir, I refunded money to West Virginia Pulp & Paper Company in the form of a check.

[fol. 161] Q. Have you that check with you?

A. Yes, sir, and the check is marked "for property of A. N. Cone, redeemed."

EXHIBIT: This check is introduced in evidence and marked Exhibit No. P-E, dated January 4, 1943, payable to West Virginia Pulp & Paper Company in the sum of $23.20, entitled "Property A. N. Cone redeemed" signed H. H. Jessen, endorsed on the back "For deposit only West Virginia Pulp And Paper Co., Charleston Account."

Portion of Cross Examination of H. H. JESSEN:

By Mr. Waring:

Q. You would have made a check out according to your books?

A. Yes, sir.

Q. So that if your book showed West Virginia Pulp & Paper Company bought it you would naturally repay them when it was redeemed?

A. Yes, sir.

Portion of Direct Examination of WESLEY M. CONE:

By Mr. Waring:

Q. Did you at any later date own any property, yourself, near there?

A. Yes, sir, adjoining this property in dispute.

Q. In which direction?

A. East from this property.

Q. Just east of this disputed property you owned that yourself?

A. Yes, sir, I got it from father.

Q. You got it from John Cone?

A. Yes, sir.

Q. Do you know where he got it?

A. I don't remember, I can't remember the name so far back, and so old I can't remember it.

Portion of Cross Examination of WESLEY M. CONE:

By Mr. Mozingo:

Q. When you got to the Canal, the dividing line, you said "Waring on that side", and "Cones on this side"?

A. Absolutely.

Portion of Cross Examination of JOHN HARVEY CONE:

By Mr. Mozingo:

Q. The canal was the dividing line between the Cone's property and the Waring and Perry tract up above?

A. Yes, sir.

• • • •

[fol. 162] Portion of Recross Examination of JOHN HARVEY CONE:

By Mr. Mozingo:

Q. So, the lands of Miles Cone and W. M. Cone and your grandfather, they joined together, didn't they?

A. Yes.

Q. The lands of your grandfather and W. M. Cone joined together?

A. W. Miles Cone and W. M. Cones joins together and W. M. Cone joined John Cone's land.

Portion of Cross Examination of HILL B. BEACH:

By Mr. Unger:

Q. Do you know the Waring property?

A. Originally the Waring but it is Perry.

Q. It was originally Waring or Perry?

A. Wasn't it bought from Waring, I know it was the Perry Property.

Q. You do know there is a Waring tract, is that right?

A. Waring?

Q. Do you know how many acres are in that Waring tract?

A. No, sir.

Q. There has been previously introduced here a Deed from Mary Joseph Waring to J. Lamb Perry, is that the Perry you are talking about?

A. This is Lamb Perry property, isn't it?

Q. The piece of land abutting, described here (reading)

> "All that Plantation or tract of land situate, lying and being in the Parish of St. Pauls in the District of Colleton (now Dorchester County) and State aforesaid called the Hope Plantation Containing Five hundred Acres more or less Butting and Bounding to the North on lands of James T. Lamb (now Perry) East and South on lands of Estate of Jos. Ioor Waring and West on lands of the estate of Benj. Perry (now Perry)" 500 acres, more or less.

This Plat here shows how many acres in the Waring tract, come down here (before Jury box) can you read?

A. I never was interested in the amount of acres in each tract, I never studied that at all. My business

Q. (Interrupting) That says "Waring"?

A. Yes, sir.

Q. 868 acres, there, doesn't it?

A. Yes, sir.

Q. Do you know where that tract of land is?

A. That is Hope Plantation.

[fol. 163] Q. The Deed said 500 acres, this Plat shows 868 acres. All right, now, Hill, since 1926 you have been working for West Virginia Pulp & Paper Company, what was the extent of your district how far did you go?

A. From the Edisto River to the Ashley River from the Coast Line Railroad up through this property as far as it extended.

Q. From the Edisto River to the Ashley River and from the Atlantic Coast Line on the South to the extent of the property on this plat?

A. Yes, sir.

Q. About how many acres to that, all in there?

A. I couldn't estimate it, I never asked the exact acreage.

Q. One thousand?

A. A good many thousand.
Q. Ten thousand acres?
A. A good many thousand.
Q. Would it be 20 thousand acres?
A. It might be, I imagine so.
Q. 30 thousand acres?
A. I never asked the exact acres the company owned.
Q. I know you don't—you went over all this land, you had all this land to cover, how much land did you cover?
A. I covered all I could.
Q. This jury doesn't know what your duties were, I want you to tell them how many acres of land you had to look over?
A. I couldn't do that.
Q. You don't know?
A. No, sir.
Q. It is, at least it is more than 20 thousand acres?
A. It might be, yes sir.
Q. As a matter of fact this Plat here adds up to almost 10,000 acres, this plat right here?
A. I never noticed the acreage before.
Q. You never have seen that plat before you were here?
A. I saw some similar to it.
Q. Have you ever studied it to see?
A. The boundary lines are all I ever studied to amount to anything.

Portion of Cross Examination of Howell Bivens:

By Mr. Mozingo:

Q. Mr. Bivens, what year did you say you went to work for the West Virginia Pulp & Paper Co.?
A. In 1925.
Q. Your position with the company, what was it?
A. Caretaker.
[fol. 164] Q. And was all of this property in your charge?
A. I looked over it, yes sir, kept fires off and trespassers.
Q. Within your charge you had a great many thousand acres to look over?
A. Yes, sir, several thousand.
Q. How many times do you guess you were ever down there where that fire line was cut?

A. I don't reckon I have been there but two or three times.

Q. It is no reflection on you, you had a large acreage to cover, it was impossible for you to go, to cover 106 acres, it is a small proportion of what they own?

A. Yes, sir.

Q. The whole time you were with the company you say you only were there two or three times?

A. That is right.

• • •

Q. And how many years were you caretaker?

A. From 1925 to 1943.

Q. That is a period of 18 years so in 18 years you visited the property about three times and on those occasions you never ran into Mr. Cone, in 18 years on three visits on the 106 acres?

A. I said three visits.

Q. (Interrupting) In all fairness it would be very unusual for you to go down there some day and see Mr. Cone on 106 acres in the acreage you had under your control. I doubt if you ever ran into other people than the people who were supposed to meet you there?

A. I ran into a few.

• • •

Portion of Cross Examination of TOM PEEPLES:

By Mr. Mozingo:

Q. Mr. Peeples, the gentleman that stood up back there have you seen him on that property much?

A. Not on that disputed property.

Q. You have seen him on the other property?

A. No, sir.

Q. But there is no question about him owning that property?

A. He owns it, so I understand.

Q. You have never seen him down there, you never saw this Mr. Cone on that disputed property?

A. I have been riding that disputed property.

Q. You have never seen either one on that property? [fol. 165] A. No, sir.

Q. One of the other witnesses testified the canal there was the dividing line between one Mr. Cone's property and West Virginia Pulp & Paper Company.

Objection by Mr. Waring: I object, he is trying to put words in this witnesses mouth.

The Court: Ask him.

Q. The canal is the dividing line between which Mr. Cone's property and West Virginia Pulp & Paper Co.?

A. How is that?

Q. There is a canal down there?

A. Yes, sir.

Q. And it is the dividing line between West Virginia Pulp & Paper Company and one of the Cones, is it not?

A. It may be the dividing line between them and one of the Cones, maybe.

Q. Which Mr. Cone is it, if you know. If you don't know it is all right.

A. I don't believe I know.

Q. You know it is a dividing line?

A. That canal don't run all the way back being a dividing line, no, sir.

Q. It is a dividing line between one of the Cones and West Virginia Pulp & Paper Co., yes or no?

A. Yes, I believe it is of the Mr. Cone back yonder, yes.

* * *

Portion of Direct Examination of RUSSELL E. HAYNES:

By Mr. Waring:

Q. Mr. Haynes, by whom are you employed?

A. West Virginia Pulp & Paper Co.

Q. What is your position with them?

A. Manager of southern woodlands.

Q. As such do you have charge of all the woodlands in this area?

A. Yes, sir.

Q. And does that include the Perry-Hughes properties?

A. Oh, yes.

Q. You have charge, too; generally of the records regarding these properties?

A. Yes, I do.

Q. As to the payment of taxes?

A. Yes, sir.

Q. And the records pertaining to the sale of timber for them?

A. I have access to those records, yes.

Q. They are under your charge?

A. Yes, they are under my charge, more or less.

[fol. 166] Q. You may not keep them all but they are under your charge?

A. That is right.

Q. Mr. Haynes, I hand you this paper, would you identify that, (handing witness a paper)?

A. That is a Tax Receipt No. 988.

(Mr. Waring shows receipt to attorney for plaintiff, who states there is no objection.)

EXHIBIT: Defendant offers in evidence two tax receipts for Dorchester County, Nos. 988 and 187, dated December 19, 1925, on 1,121 acres and 6,010 acres, respectively, each marked as Exhibit No. D-19.

The Court: Why not let him identify them all at one time and put them in as one pack, Exhibit No. (so and so) with a, b, c, etc. I suppose they are consecutive years?

Mr. Waring: No, sir.

Q. What is that year, Mr. Haynes? (referring to the two offered in evidence)

A. 1925, two tax receipts for 1925.

Q. (Handing witness other papers)

Q. Tax Receipts for 1940, school district 13 and 22.

The Court: Do these all cover the same property?

A. They cover this and adjoining properties of the Perry-Hughes.

The Court: The 1925 Tax receipts are put in as a numbered Ex. D-19.

Q. We have tax receipts for 1940, and these are for what year.

A. (Looking) 1941.

Q. And these are 1942, and these are 1943, and these are for 1944.

A. (Looking) Yes.

The Court: Do you gentlemen want to see them (speaking to attorneys for plaintiff.)

Mr. Waring: I would like to introduce them and then I want Mr. Haynes to read from the receipts and identify them.

EXHIBITS: Three tax receipts, Dorchester County, paid by the West Virginia Pulp & Paper Co., Nos. 5198, for

2000 acres; No. 9898 for 5106 acres, 2 bldgs; No. 5199 for 257 acres, paid Dec. 30, 1940, in School Districts Nos. 13, 22, and 13, respectively, marked in evidence as Exhibit No. D-20, each.

[fol. 167] Also, Three tax receipts, Dorchester County, paid by the West Virginia Pulp & Paper Co., Nos. 5261, 2000 acres, Sch. Dist. 13; No. 5262, 257 acres, Sch. Dist. 13; and No. 9915, 5106 acres, 2 bldgs., Sch. Dist. 22, each marked in evidence as Exhibit No. D-21, paid Dec. 22, 1941.

Also, Tax Receipts, 1942 taxes, Dorchester County, paid by West Virginia Pulp & Paper Co. in Sch. Dist. 13, (2) receipts Nos. 5442 and 5443; and (1) receipt, No. 10423, in Sch. Dist. 22, each of the three receipts marked in evidence as Exhibit No. D-22.

Also, Three tax receipts, 1943 taxes, Dorchester County, paid by West Va. Pulp & Paper Co., Nos. 5537, 5538, and 10821, each of the three receipts marked in evidence as Exhibit No. D-23.

Also, Three tax receipts, 1944 taxes, Dorchester County, paid by West Va. Pulp & Paper Co., Nos. 5547, 5546, and 10911, the two former being in School Dist. 13, and the latter in Sc. Dist. 22, each of the receipts marked in evidence as Exhibit No. D-24.

Q. Mr. Haynes, what exhibit is that, sir?

A. Exhibit D-19.

Q. Will you state what that is?

A. Well, the 1121 acres; there, that is a tax receipt No. 988 for 1121 acres.

Q. In what School District?

A. I don't think it was noted back there on that. That is a 1925 return and the District, I am not familiar with that.

Q. In what County?

A. Dorchester County, School District 11, for 1121 acres.

Q. And that shows the tax was paid for that year?

A. On the Waring and the Cadden properties.

Q. How do you know that?

A. By the acreage, the map acreage.

Q. Why do you say that, that that acreage corresponds?

A. Well, the two of them combined make up that acreage, 862 acres—for the Waring Tract it is 868 acres and 253 acres.

Q. I show you here, Mr. Haynes a Deed from H. Lamb Perry to West Va. Pulp & Paper Co., Defendants Exhibit D-2, dated April 5, 1924, and ask you to identify from that [fol. 168] acreage or read from that acreage, as given?

A. You want me to read just the acreage?

Q. Yes.

A. (reading) 253 acres Caddan, and all that certain part, Waring tract 868 acres.

Q. The two added together give you how many acres?

A. 1121 acres.

Q. Now, is there another receipt attached to that?

A. Yes, sir, for Dorchester County, No. 987, for 1925, 6010 acres.

Q. What does that represent?

A. That represents the Perry lands.

Q. Known generally by the company as what?

A. J. Lamb Perry.

Q. And—

A. And Hughes.

Q. And those are 6010?

A. 6010 acres, yes, sir.

Q. I hand you tax receipts, please identify them, they are Defendant's Exhibit D-20.

A. Tax receipt for the year 1940, Dorchester County, No. 5198 for 6000 acres in School District 13.

Q. How many acres?

A. 6000 acres, I am wrong, 2000 acres, value of $6000.

Q. 2000 acres in the School District No. what?

A. No. 13.

Q. Have you another receipt there for Dorchester County?

A. Yes, sir, another tax receipt for 1940, Dorchester County No. 5199, School District 13, for 257 acres, and the next receipt is for 1940, Dorchester County, No. 9898, Sch. District 22, 5106 acres.

Q. Now, can you tell from your records what properties those are for which the tax was paid?

A. Yes, sir.

Q. Could you explain how and what properties they are?

A. It covers the Waring, the Ann Waring tract, 257 acres and 5106, and the 2000 acres are Waring, J. Lamb Perry and Hughes tract.

Q. Do they include the property in dispute?

A. Yes, sir, they include the property in dispute.

Q. I hand you Defendant's Ex. D-21, would you go through and explain that in the same way?

A. This is for the year 1941, Tax Receipt, Dorchester County, No. 5261, for 2000 acres in School District 13; [fol. 169] tax receipt No. 5262, 1941, Dorchester County for 257 acres in School District 13, and tax receipt in the year 1941, Dorchester County, No. 9915, 5106 acres in the school district 22, and that covers the same land mentioned in the 1940 taxes.

Q. Now, Mr. Haynes, I will ask you to run rapidly thru these and in the same way tell me what they are, Exhibits D-22, D-23, and D-24, and I ask you what they are and state very briefly what they represent?

A. They are tax receipt for 1942, Dorchester County, No. 5442, 2000 acres in school district 12; tax receipt for 1942, Dorchester County, No. 5443, for 257 acres, in School Dist. 13; Tax receipt for 1942, Dorchester County, No. 10423, covering 5106 acres, in school district 22, that covers the same lands mentioned in the 1940 and 1941 taxes.

This is a tax receipt for 1943, Dorchester County, No. 5537, covering 2000 acres; tax receipt for 1943, No. 5538, covering 257 acres, those are both in School District 13; and tax receipt for 1943, Dorchester County, No. 1082; covering 5106 acres in School District 22. that again covers the same land mentioned in the previous years.

1944 tax receipt No. 5547, covering 257 acres in school district 13; tax receipt for 1944, Dorchester County, covering 2000 acres (No. 5546), in School District 13; and tax receipt for 1944, Dorchester County, No. 10911, covering 5106 acres in School District 22, that covers the same property mentioned before in the previous years.

* * *

The Court: Let Mr. Haynes remove the sheets that pertain to this property and put them in evidence.

Exhibit: One sheet, showing return for School District 13, is offered and marked into evidence as Exhibit No. D-25.

Also, Sheet for School District 22 is offered and marked into evidence as Exhibit No. D-26.

Q. Mr. Haynes, I hand you Ex. D-25, will you state what you find on that, what is that?

A. This is a return for taxes for the fiscal year, commencing January 1, 1938 for the School District 13, of Dorchester County, by West Va. Pulp & Paper Co., and [fol. 170] contains among other tracts the Perry-Hughes, a portion of it, 2000 acres, the Ann Evans Waring tract, 256.60 acres.

Q. That is all of the lands in that school district which the company refers to as the Perry-Hughes properties?

A. Yes, sir.

Q. I ask you to identify that, Defs. Ex. D-26, (handing witness exhibit)?

A. That is the return for taxes for the Fiscal Year commencing January 1, 1938 for the County of Dorchester, School District 22, return made by West Va. Pulp & Paper Company covering among other lands 5106 acres, known as a part of the Perry-Hughes tract.

Q. Now, Mr. Haynes, you have 2000 acres and 256 acres in No. 13?

A. 257 acres in 13.

Q. And 5106 acres in 22, which combined you identify as containing all of the lands in the Perry-Hughes tract. How can you reconcile that?

A. By the map, by the survey of that boundary.

* * *

Q. Do you have any tax receipts between the years 1925 and 1940?

A. I have them here, there are a good many.

Q. Now, without painfully going through them all, can you indicate whether similar payments were made on this property?

Objection by Mr. Unger: I object, make it more specific, what do you mean by "similar payments"?

The Court: If you must prove the taxes for each year, if you think it is necessary, go ahead and do it.

A. They are not sorted, but we can take them out.

Q. Did you pay the taxes on this particular property for 1926, I will ask you that?

Mr. Waring: I don't know, I think I will just

The Court: I don't think so, you may introduce it if you wish to.

Mr. Unger: We can't admit he has tax receipts in there for a number of years.

The Court: There is no criticism at all, if they want to put them in they can tabulate them.

Mr. Waring: I withdraw the question.

[fol. 171] Portion of Cross Examination of RUSSELL E. HAYNES:

By Mr. Unger:

* * *

Q. The Court: The direct examination is finished?

Mr. Waring: Yes, sir.

Q. Mr. Haynes, do you actually know where this 106 acres is?

A. I do not.

Q. You never have been over it?

A. I never have been on the property. I know the general location.

Q. You know, according to the evidence you introduced it is in school district 22, Burns Township?

A. Yes.

Q. Do you know whether or not that was formerly School District 11?

A. It was my understanding that School Districts changed back in 1925 or 1926, what school district it was originally, I wouldn't know.

Q. In 1925 you returned for taxes 1121 acres and 6010 acres in School District 22, that includes the land in question?

A. That is my understanding.

Q. In 1926 did you make a return?

A. I am sure there was a return made, of course, you understand, I didn't make the returns.

Q. You have no records in the office of that return in 1926?

A. I am satisfied there were taxes paid that year.

Q. May I have it?

A. The Tax Receipt?

Q. The Tax Return for 1926 for 1121 acres, in Burns School District 11, according to your receipt?

A. (Looking among receipts) Here are the receipts covering various tracts in School District 11.

Q. In 1926?

A. In 1926, yes, sir.

Q. Do you have one for 1121 acres?

A. It is a return for J. Lamb Perry and Blackburn Hughes, 7131 acres.

Q. Let me see the receipt, please sir.

A. Here it is, that takes a group of acres that is 18,400 acres.

Q. What School District is this in?

A. That is Township 11.

Q. That is Township 11, where is that on this receipt?

A. This is a part of the school—the list shows the grouping of that acreage.

Q. Do you see any School District 11, on that receipt?

[fol. 172] A. There is an 11 down there in the lefthand corner.

Q. It is your position in 1926 that you return it as how much acreage?

A. 7131.

Q. 18,400 acres?

A. That is right, it included the Blackburn Hughes and Perry tracts, which was 7131 acres.

Q. So that you lump it altogether in 1926 and had 18,400 acres in this one school district?

A. That is right.

Q. All right, how about 1927, have you a receipt in 1927?

A. Yes, sir, here is one for 1927.

Q. What school district have you got that?

A. 11, it is listed the same way,

Q. What are these other receipts, in School District 11, how much land did you own in this school district?

A. The acreage could be added up, I couldn't say, offhand, but considerable acreage, there are three different receipts covering township 11.

Q. All right, and you don't know if it was included in this 18,400 acres?

A. Oh, yes, I do, it shows the receipt numbers here and the acreage given here, on the various tracts to make the 18,400.

Q. Identify the 18,400 on that list you have, 1927.

A. Perry and Hughes, 7131, that was part of the 18,400.

Q. Perry-Hughes listed 7131 acres, is included in this 18,400 acres?

A. Yes, sir.

Q. 1927, 7131 acres in Perry-Hughes?

A. That is right.

Q. Now, in 1928, what receipt have you got there that belongs to this?

A. Same acreage and same school district, 18,400 acres.

Q. Do you have anything to show what makes up that 18,400?

A. This same acreage that was shown in previous lists.

Q. You assume that?

A. I don't have the detailed list.

Q. You are assuming that that was part of the 18,400 acres?

A. Yes, sir.

Q. Any school district?

A. School District 11.

Q. Now, how about 1929?

A. (Looking) 1929.

Q. You have a receipt there?

A. Yes, sir. Covering 18,400 acres, School Dist. 11.

[fol. 173] Q. May I see it. What other school districts have you there in that pile?

A. Two more—three more school districts, No. 13, No. 14, No. 18, and No. 16.

Q. Now, will you please give me, this is 1929, give me the 1928 and 1927 again, please, sir.

A. You mean the tax receipts?

Q. Yes.

A. There is 1928 and 1927.

Q. How about 1930?

A. (Looking among tax receipts) 1930, School District 11, tax receipts covering 19,420.6 acres.

Q. You are assuming that is a part of this?

A. I am assuming that is a part of what?

Q. That this 106 acres is a part of this 19,420.6, you are assuming that?

A. Based on former returns.

Q. Based on the fact you had an itemized statement in your records before?

A. Yes, sir.

Q. All, right, 1931?

A. 1931, that is when the school district changed.

Q. Yes, sir, formerly 11, now 22.

A. I have two receipts here one in 13 and one in 22 covering acres.

Q. What acres do they cover, in School district 22?
A. 9420.6, we had detailed lists for them.
Q. You had them?
A. We had them for each year but I only have the one for 1940, here.
Q. 1931—9420 acres. How about 1932?
A. You just asked me for School District 22?
Q. Yes?
A. 9420 acres.
Q. Now, 1933? 1933 is how much?
A. 9420 acres.
Q. Now, 1934?
A. We have several School District 22 here.
Q. Tell me which piece of land this one was returned in?
A. Frankly, without that detailed list I wouldn't know.
Q. You have such a detailed list?
A. Oh, yes, it is in our office.
Q. You didn't bring it with you?
A. I did not.
Q. What about next year, 1935 is that in the same condition? Let's see those that are all in District 22, that is what you have in School district 22? Let's keep those separate. Now, in 1934 School District 22?
A. All of them in School District 22?
[fol. 174] Q. Yes.

The Court: You have quite wide latitude in cross examination, Mr. Unger—what is the purport of all these tax receipts?

Mr. Unger: These tax receipts are not paid by West Va. Pulp & Paper Company, your Honor.

The Court: They are not?

Mr. Unger: No, sir, these are Cooper River Timber Company.

The Court: Couldn't you just ask him a question as to how long the Cooper River Timber Company owned this property and when the property was transferred?

Mr. Unger: May i please the Court, there is no deed that the Cooper River Timber Company ever owned any of this property or any part of it .

Q. (Getting receipts for 1934 from the witness.) And now 1935, Mr. Haynes?
A. (Giving Mr. Unger the receipts for 1935.)

Q. Is that all School District 22?

A. Yes, sir.

Q. These are all Cooper River Timber Company?

A. Yes, sir.

Q. No, there is one West Va. Pulp & Paper Company, what is that?

A. That is a lease, that is a timber lease.

Q. The West Va. Pulp & Paper Company did return one thing in 1935?

A. Must have, there it is.

Q. All these others are to the Cooper River Timber Company? No, there is another, there is two of them?

A. That is a timber lease.

Q. Two timber leases, and all the rest of these are to the Cooper River Timber Company. Now, 1936? You have 1936, all the returns in School District 22, are you able to identify any of these receipts as the taxes paid on this 106 acres? A. There is 5106 acres, which we returned.

Q. Hand me that, one receipt that is the taxes on this 106 acres?

A. Yes, sir.

Q. That is in the name of West Va. Pulp & Paper Co?

A. Yes, sir.

Q. It is, in 1936. This is your 1925 return?

A. Yes, sir.

Q. That is in the name of West Va. Pulp & Paper Co?

A. Yes, sir.

[fol. 175] Q. And so it isn't until again in 1936 the taxes began to be paid in the name of West Va. Pulp & Paper Co.?

A. No, from the tax receipts, that is true.

Portion of Re-direct Examination of Mr. Russell E. Haynes:

The Court: Let me ask you something, why did these lands you refer to in the tax receipts—were they owned by the Cooper River Timber Company or the West Va. Pulp & Paper Co?

A. That would be a hard one for me to understand.

The Court: Who made the tax returns?

A. The man who made the tax returns?

The Court: No, not the man who wrote down the return but who supervised.

A. Mr. Cuthbert.

The Court: Do you know why West Va. lands were returned in the name of Cooper River Timber Company or vice versa?

A. I think that was the name of the corporation at that time.

Portion of Re-cross Examination of Mr. Russell E. Haynes:

By Mr. Unger:

Q. As a matter of fact the deed to this property was taken in West Va. Pulp & Paper Company, was it not? West Va. Pulp & Paper Company was a corporation in 1925?

A. I couldn't say that.

Q. Your tax record in 1925 was in that name it shows it was West Va. Pulp & Paper Company, does it not?

A. Yes, sir.

Ruling on Auditor's Certificate

Mr. Unger: We introduced in the case in chief, and you reserved your ruling, on the certificate of the auditor of Dorchester County on the true and correct copy of records in regard to Burns School District #22 of tracts of West Va. Pulp & Paper Company, you reserved your opinion on the ground that there was no testimony where the land lies. At this state we would ask for your ruling on that certificate.

[fol. 176] The Court: Let me see it. (A copy is handed the Court)

Mr. Unger: There was no proof at that time that the land was in School District 11 and 22 and we think the thing has been cleared up by the testimony of Mr. Haynes and these receipts simply show it is true the West Va. Pulp & Paper C mpany did not return the land for taxes.

Mr. Waring: It doesn't show any such thing. This shows my friend is reading a lot into the record.

The Court: I will let it in, it shows the West Virginia Pulp & Paper Co., did return in 1925 and no return to 1930 in School District 11, no return except in 1925;

then in 1931 school District 11 became school district 22, and there was no return and that goes through 1936. It shows the same thing that has been testified to by your witness.

Mr. Waring: I am objecting right here, sir, all this business about Waring Tract, which my friend is trying to read into this record, has absolutely nothing to do with this. It is a wholly different tract and has nothing to do with the case at issue.

The Court: Is this the complete return?

Mr. Unger: This is his entry, an entry in 1937 and 1936, we have a complete return, a complete listing in that School District, because we were unable to identify what of the tracts it came out of, in 1938 to 1943 it shows one of the tracts.

The Court: I will admit it in evidence and tell the jury this part, from 1938 to 1943 is just a portion that is picked out from the auditor's reports, there may be hundreds or thousands of other acres returned. We don't know, you may take it with that, in other words, it is not a full record, it is a record of part of the return.

Mr. Unger, you didn't attempt to get a certificate of the entire return?

Mr. Unger: Your Honor, at the pre-trial, this Waring land came up and I didn't have the information to know what part they claimed and we secured information a Waring Tract was returned.

The Court: That is all the testimony you have?

Mr. Unger: Yes, sir.

[fol. 177] CERTIFICATE

STATE OF SOUTH CAROLINA
County of Dorchester

St. George, S. C., 14 May 1945

I, the undersigned H. J. Patrick, duly elected and qualified Auditor for Dorchester County, South Carolina, hereby certify the following to be a true and correct copy of records under my supervision in the County Court House of Dorchester County:

1. 1944 Burns Sch. Dist. #22 Various tracts inter alia of W. Va. Pulp & Pap. Co. Waring Tract 508 acres Pd.

1943 " " " " " " "
1942 " " " " " " "
1941 " " " " " " "
1940 " " " " " " "
1939 " " " " " " "
1938 " " " " " " "

1937 Burns School District #22
West Virginia Pulp & Paper Co.
Various Tracts as follows: 144 acres
636 "
43 "
143 "
5106 "
44 "
268 "
343 "
57 "
162 "
124 "
240 "

Pd.

[fol. 178]

1936 Burns School District #22
West Virginia Pulp & Paper Co.
Various tracts as follows: 144 acres
636 "
42 97/100 acres
142 8/10 "
5106 "
44 2/10 "
268 40/100 "
343 28/100 "
57 1/2 "
162 "
124 "

1935 Personal property $2,520.00. No real estate.

1934	Burns	School	District	#22	No	return
1933	"	"	"	"	"	"
1932	"	"	"	"	"	"

West Virginia Pulp & Paper Co.

1931	Burns	Sch.	Dist.	Formerly #11 now #22	no	ret.
1930	Burns	School	District	#11	no	return
1929	"	"	"	"	"	"
1928	"	"	"	"	"	"
1927	"	"	"	"	"	"
1926	"	"	"	"	"	"
1925	"	"	"	"	1121 acres and 6010 acres	

2. J. Lamb Perry to West Virginia Pulp & Paper Company

1924	Burns School District #11	900 acres
		250 acres
		5 "

Certified under seal in my office this 14th day of May 1945.

(Signed by) J. H. PATRICK (L.S.)
J. H. PATRICK, Auditor
Dorchester County

[fol. 179] PLAINTIFF'S EXHIBIT

P-E

Check of H. H. Jessen, Sheriff of Dorchester County to West Virginia Pulp and Paper Company, redeeming land of A. N. Cone from tax sale.

Front Side

Reverse Side

1382A

OFFICE OF SHERIFF
DORCHESTER COUNTY
ST. GEORGE, S. C.

CHARLESTON, S.C. January 4th 1943 No. 810

KING STREET OFFICE

CAROLINA SAVINGS BANK

KING STREET

PAY TO THE ORDER OF West Virginia Pulp & Paper Co $23.20

Twenty-three 20/100 DOLLARS

COLLECTIBLE AT PAR THROUGH ANY FEDERAL RESERVE BANK

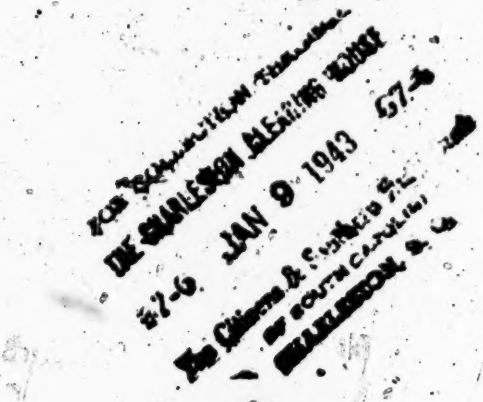
Property -
A. H. Cone - Redeemer

A. H. Geer SHERIFF
DORCHESTER COUNTY, S. C.

A-179

1328

FOR DEPOSIT ONLY
WEST VIRGINIA PULP
AND PAPER CO.
CHARLESTON ACCOUNT



IN EVIDENCE
Exhibit No. P-6
ERNEST L. ALLEN
U.D.C.D.S., E.D.S.C.

B-179

[fol. 180] AFFIDAVIT IN REPLY TO NOTICE OF MOTION OF DEFENDANT FOR NEW TRIAL ON THE GROUNDS OF AFTER DISCOVERED EVIDENCE

Personally appeared before me H. Wayne Unger, who upon being duly sworn says that he is one of the Attorneys for the Plaintiff in the above entitled case; that he has been served Notice of Motion for a New Trial on the Grounds of After Discovered Evidence, annexed to which is affidavit of Charles W. Waring, one of the Attorneys for the Defendant, in which he alleges that the Defendant was taken by surprise in that they had no knowledge that the Plaintiff claimed title to the tract of land in dispute through Miles Cone under deed from A. Miles Cone dated 19 September 1888, recorded 6 October 1888 in Clerk of Court of Colleton County in book 7 at page 282, and that there was no evidence at the pretrial conference or prior to the trial between the attorneys that the Plaintiff claimed through said deed; that the deponent in accordance with the agreement with counsel at the pretrial conference on May 17, 1945, prior to trial, mailed to the said Charles W. Waring certified copies of the papers which he desired admitted in the chain of title of the respective parties without formal proof including the deed from A. Miles Cone to Miles Cone, copy of which letter deponent annexes hereto and makes a part hereof; That prior to May 17, 1945 the deponent met with the said Charles W. Waring in the Office of Clerk of Court of Dorchester County at St. George, S. C., where they were both preparing for trial, and *thereat* verbally discussed with [fol. 181] him the admission of these particular deeds and brought to his attention that the only deeds required by the Plaintiff for his chain of title would be the said deed from A. Miles Cone to Miles Cone and from Caroline F. Cone to the Plaintiff, Andrew M. Cone; that subsequently on May 18, 1945 the said Charles W. Waring, Defendant's Counsel, mailed to the deponent Defendant's exhibits which included the said deed from A. Miles Cone to Miles Cone, the letter transmitting said certificates being annexed to this affidavit; deponent further says that the said Charles W. Waring and the Defendant through the above exchange of deeds had adequate notice of the claims of the Plaintiff through the deed of the said A. Miles Cone to Miles Cone, and on page 91 of the transcript of

the record in the above entitled case the Defendant by Charles W. Waring introduced into the formal evidence of the case a certified copy of the deed from A. Miles Cone to Miles Cone over the objections of the deponent who pointed out the said deed was already in the record as Plaintiff's exhibit; that on page 5 of the said transcript of the testimony in the case the said Charles W. Waring objected to the introduction of the deed by the Plaintiff from A. Miles Cone to Miles Cone on the grounds that it bore no relationship to the land in dispute, showing that he was fully aware of the Plaintiff's position that it was a part of this land; that the transcript of testimony throughout the case shows that the Defendant was prepared to dispute the Plaintiff's claim of title through this deed from A. Miles Cone to Miles Cone and on page 97 of the transcript the Defendant on direct examination of its witness Wesley M. Cone secured testimony from Mr. Wesley M. Cone that he was a brother of Miles Cone and knows his land and that the disputed property was not a part of it; Again on page 101 of the transcript the Defendant on direct examination of its witness John Harvey Cone, the brother of the said Wesley M. Cone and a nephew of Miles Cone, testified that the Miles Cone property referred to in the Defendant's as well as the Plaintiff's exhibit did not include the disputed property and that the Miles Cone property therein referred to was always to the West of the disputed property; Again [fol. 182] on page 124 of the transcript of testimony on direct examination the Defendant through its witness Hill Beach testified that the Miles Cone property was always to the west of the disputed land; So that the deponent sayeth that the Defendant was not surprised by claim of the Plaintiff through said deed from A. Miles Cone to Miles Cone but on the contrary was prepared to offer testimony, and did offer testimony that it was not a part of said tract; that deponent further sayeth that prior to May 17, 1945 at which time the deponent met the said Charles W. Waring at the Office of the Clerk of Court of Dorchester County at St. George, S. C., at which time the deponent was securing certificates from the Auditor of Dorchester County, that the said Charles W. Waring was also examining the records of the Auditor of Dorchester County and knew from the original pre-trial conference, at which time deed from Caroline F. Cone to A. N. Cone

was introduced, that the Plaintiff was claiming through said Caroline F. Cone the land in dispute and that the said Charles W. Waring had ample opportunity to examine the Auditor's records relative to the said Caroline F. Cone, through which Plaintiff claimed, at that time and various times prior to trial; at the time of said meeting, prior to trial said Charles W. Waring also examined the public records of Dorchester County and that the deponent and the said Charles W. Waring mutually exchanged copies of deeds in the chain of title including the said deed from A. Miles Cone to Miles Cone and that the said Charles W. Waring had ample opportunity to examine the records there at the time and prior thereto before trial to determine the disposition of the property of the said Miles Cone, including the deeds and instruments annexed to his Notice; the deponent further sayeth that Owen Cone, present owner of the estate of Miles Cone under the deeds annexed to the Defendant's Notice, testified at the trial that he claims no interest in the 106 acres of land (page 53 of transcript) that the said Miles Cone cut off from his estate, a piece of land to the east, being the disputed property, for his mother Caroline F. [fol. 183] Cone (page 57 of the transcript) and to his knowledge his mother owned no other land in that School District,

(Signed by H. Wayne Unger)
H. Wayne Unger

Sworn to before me this 30 day of July 1945. Florence V. Gensheimer, Notary Public for South Carolina. My commission expires at the pleasure of the Governor. (Seal)

May 17, 1945

Waring & Brockinton
35 Broad Street
Charleston, South Carolina

Mr. Charles W. Waring

Gentlemen:

Re: *A. N. Cone* v. *West Virginia Pulp & Paper Co.*
I enclose herewith carbon copies of certified deed from M. J. Waring to J. Lamb Perry recorded in Dorchester County deed book 2 at page 213; deed from A. Miles Cone

to Miles Cone recorded in Dorchester County. Colleton Transfer deed book 6 at page 138; and deed from Susan M. Perry to Miles Cone recorded in Dorchester County Colleton Transfer book 6 at page 137. These original certificates will be part of the Plaintiff's exhibits.

This will also confirm our conversation at St. George last Monday, that you will produce Cutting Agreement between West Virginia Pulp & Paper Company and Mr. George Cooley of Carolina Logging Corporation for cutting the timber on the 106 acres in dispute, without formal notice.

We trust that you have been able to secure the services of a reporter, but if by any chance you were unable to do so our Mrs. Florence Gensheimer states she is willing to try her hand at it although she has never reported any big [fol. 184] court cases. She has handled many Magistrate trials and inquests for me in an excellent manner.

Yours very truly Jefferies, McLeod & Unger
(signed) H. Wayne Unger U/g enc.

WARING & BROCKINTON
35 Broad Street
Charleston-F, South Carolina

May 18, 1945

Messrs. Jefferies, McLeod & Unger, Attorneys at Law, Walterboro, S. C.,

Re: *A. N. Cone* v. *West Virginia Pulp and Paper Company*

Gentlemen:

We have just received a complete set of all Deeds which were to be certified for us in connection with the above matter. Accordingly, we are only now able to send you a complete set of carbon copies of all of the Deeds which we expect to present in evidence.

You will find enclosed copies of the following Deeds:

1. A. Miles Cone to Miles Cone (with plat) recorded Dorchester County, Transcription Book 6, Page 138.

2. Joseph I. Waring to John Cone (with plat) recorded Dorchester County, Transcription Book 10, Page 103.

3. John Cone to Sarah Cone, recorded Dorchester County, Book 1, Page 480.

4. Sarah Cone to James Cone, recorded Dorchester County, Book 20, Page 78.

5. James Cone to Fred Goodwine, recorded Dorchester County, Book 32, Page 71.

6. Fred Goodwine to Bank of Dorchester, recorded Dorchester County, Book 49, Page 6.

7. Bank of Dorchester, to Cooper River Timber Company, recorded Dorchester County, Book 51, Page 387.

[fols. 185-186] 8. Cooper River Timber Company to West Virginia Pulp and Paper Company, recorded Dorchester County, Book 61, Page 588.

9. James Lamb Perry to West Virginia Pulp and Paper Company, recorded Dorchester County, Book 43, Page 586.

10. Mary Joseph Waring to J. Lamb Perry, recorded Dorchester County, Book 2, Page 213.

11. James Tupper, Master, to Mary S. Waring and Josephine M. Waring, recorded Dorchester County, Book 43, Page 509.

12. Elias B. Scott to Joseph Ioor Waring (with plat) recorded Dorchester County, Book 43, Page 592.

Arrangements have been made with Mrs. Wallace of Florence to report the case and I think that you will find her work entirely satisfactory. We have had her do similar work previously and were very much pleased with her report.

We will produce at the time of the trial without formal notice a copy of the Cutting Agreement entered into between West Virginia Pulp and Paper Company and Carolina Logging Company in September, 1941.

Very truly yours, Waring & Brockinton, By (signed) Charles W. Waring, CHW:g.

[fol. 187] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5442

WEST VIRGINIA PULP & PAPER COMPANY, a Corporation, Appellant,

VERSUS

A. N. CONE, Appellee

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston

MINUTE ENTRIES

October 20, 1945, the transcript of record is filed and the cause docketed.

Same day, order extending the time for filing the record and docketing the action is filed.

Same day, the original exhibits are certified up.

October 25, 1945, the appearance of H. Wayne Unger and James P. Mozingo is entered for the appellee.

October 26, 1945, the appearance of Christie Benet, D. A. Brockington and Charles W. Waring is entered for the appellant.

October 29, 1945, statement under section 3 of rule 10 is filed.

November 7, 1945, application of appellant for leave to file a bond for costs on appeal in the amount of Two Hundred and Fifty Dollars is filed.

ORDER GRANTING APPELLANT LEAVE TO FILE BOND FOR COSTS ON APPEAL—Filed and Entered November 7, 1945

On consideration of the Application of appellant, by its counsel,

Leave is hereby granted the appellant to file in the District Court of the United States for the Eastern District of South Carolina, at Charleston, a bond for costs on appeal in the amount of Two Hundred and Fifty Dollars in the above entitled case.

November 7, 1945.

Morris A. Soper, U. S. Circuit Judge.

[fol. 188] Same day, to-wit, November 7, 1945, certified copy of order granting leave to appellant to file bond

for costs on appeal is transmitted to the Clerk of the U. S. District Court at Charleston, S. C.

December 6, 1945, certified copy of order of District Court amending the transcript of record is filed.

Note: This appears at page 232a of the complete transcript of record and is, therefore, omitted here.

December 14, 1945, brief on behalf of the appellant is filed.

December 15, 1945, appendix to brief of appellant is filed.

December 31, 1945, brief and appendix on behalf of the appellee are filed.

Argument of Cause

January 10, 1946, (January term, 1946) cause came on to be heard before Soper and Dobie, Circuit Judges, and Gilliam, District Judge, and was argued by counsel and submitted.

[fol. 189] UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT

No. 5442.

WEST VIRGINIA PULP & PAPER COMPANY, a Corporation, Appellant,

VERSUS

A. N. CONE, Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, AT CHARLESTON. CIVIL ACTION.

(Argued January 10, 1946.

Decided February 7, 1946.)

Before SOPER and DOBIE, Circuit Judges, and GILLIAM, District Judge.

[fol. 190] Christie Benet and Charles W. Waring (D. A. Brockinton and J. B. S. Lyles on brief) for Appellant; and H. Wayne Unger and James P. Mozingo (Jefferies, McLeod & Unger, and W. J. McLeod, Jr., on brief) for Appellee.

OPINION—Filed February 7, 1946

DOBIE, Circuit Judge:

Andrew N. Cone, hereinafter referred to as plaintiff, brought an action in the Court of Common Pleas for Colleton County, South Carolina, against West Virginia Pulp and Paper Company, a Delaware corporation, hereinafter referred to as the Paper Company, or as defendant, claiming $25,000 damages for trespasses by the defendant in entering plaintiff's land and cutting and removing timber therefrom. The case was removed to the United States District Court for the Eastern District of South Carolina on the ground of diversity of citizenship and was tried with a jury at the May Term, 1945.

The plaintiff's amended complaint alleged that he was the owner of a tract of land situate in Dorchester County, South Carolina, consisting of 106.5 acres, which had been conveyed to him by his mother, Caroline F. Cone, in 1920, and that he had thereafter been in quiet, peaceable and exclusive possession of this tract of land for more than twenty years. He further alleged that the defendant, its agents and servants, had entered thereon in September, 1941, without the plaintiff's knowledge or consent, and had cut and removed a large quantity of timber. The defendant entered a general denial and, after two pre-trial conferences, the case came on for trial.

[fol. 191] The action was in the nature of the old common law action of trespass *quare clausum fregit*, which bases the plaintiff's right to recover upon the injury to his possession. Hence the defendant's general denial put plaintiff first to the proof of such possession, actual or constructive, as would maintain an action. The South Carolina authorities are clear that plaintiff might do this by proof either of actual physical possession, the *pedis possessio*, or by proof of a perfect legal title, from which constructive possession is presumed. *Beaufort Land & Investment Co.* v. *New River Lumber Co.*, 86 S. C. 358, 68

S. E. 637; *Haithcock* v. *Haithcock,* 123 S. C. 61, 115 S. E. 727, 734; Section 377, Code of South Carolina, 1942. Constructive possession may also be shown by other methods, as by physical occupancy of part of a tract under color of title, whereby constructive possession of the entire tract is said to be established; but we are here dealing with wild and unoccupied lands, and no actual physical occupancy of these lands was either claimed or proved by plaintiff.

At the trial plaintiff undertook first to prove his legal title. This he might do in any one of four ways: (1) by producing a grant from the State and connecting himself therewith by an unbroken chain of paper title; (2) by tracing his paper title back to a common source and proving the better title therefrom; (3) by showing that he, together with those under whom he claimed, had been in adverse possession continuously for twenty years, whereby a presumption of a grant would have arisen; or (4) by proving that he himself had been in adverse possession continuously for a period of ten years. *Thomas* v. *Dempsey,* 53 S. C. 216, 220, 31 S. E. 231, 233; *Haithcock* v. [fol. 192] *Haithcock,* 123 S. C. 61, 66, 115 S. E. 727, 729. Admittedly, he made no serious attempt to qualify under either of the first two of these methods, since he produced no paper title back of 1888 and was unable to connect up by admissible evidence the title back of his immediate grantor, his mother, who, it was stated, had acquired the property in 1917. In this connection it may be noted that plaintiff's deed from his mother, contrary to almost universal practice, makes no mention whatsoever of the source of his grantor's title.

It may be interjected here that harmful error unquestionably took place in the admission of, and failure to take from the jury, testimony with respect to the plaintiff's purported chain of title prior to the deed from his mother to him. All this testimony was admitted by the judge "subject to it being connected up with the present owners", yet when a motion to strike it for failure so to connect this testimony was made, the judge denied the motion, stating that this was a matter for the jury. The confusion made possible by this retention of inadmissible evidence as to the state of the plaintiff's title is best exemplified by the fact that the judge himself speaks of the

"lost deed" from plaintiff's father to his mother, although there is not a single scrap of testimony in the record that the deed was lost or in any other manner accounted for, nor was even its original existence ever testified to by anyone who had seen it.

Returning to the details of the plaintiff's proof, we find that his inability to establish proper paper title left him dependent upon proof of adverse possession, either for ten years in himself, or for twenty years in himself and those under whom he claims, if he was to establish title as a [fol. 193] basis for the present action. The extent of the adverse possession required as to unenclosed and unimproved lands is stated by the statute to be "where * * * it has been used for the supply of fuel or of fencing timber, for the purposes of husbandry, or the ordinary use of the occupant." Section 379, Code of South Carolina, 1942.

The quality of the plaintiff's proof as to any such possession left much to be desired. Accepting his own testimony at face value, he had hunted on it, though not every year, had cut and sawed some fallen trees for clapboard in 1923 or 1925 "and all through there", and would camp upon it for as much as a week at a time during hunting season. However, he had never posted it, claimed never to have seen either the fire line cut by the CCC in 1935 or the posted signs regularly maintained by the defendant, both of which were testified to by several witnesses, and finally summarized his actions in the following words: "After I moved away from there (in 1923) I didn't do nothing." Aside from this testimony, the only other evidence of his possession was that he paid taxes on the property and that his father, in his behalf, had given one other individual permission to hunt on the property.

Such sporadic acts do not satisfy the requirements to constitute adverse possession. Among the many decisions on this point, reference is made to only a few. From this Court, in another South Carolina case, we find the following statement in an opinion by Judge Woods in *Mullins Lumber Co.* v. *Williamson & Brown Land & Lumber Co.*, 255 F. 645, 647:

> "The land in dispute was wild swamp land, incapable of cultivation. The testimony relied on to establish adverse possession proved no continuous use or

acts of trespass, but only occasional cutting of [fol. 194] timber. This is not sufficient to establish the requisite continuity of possession. *Bailey* v. *Irby*, 2 Nott & McC. (S. C.) 343, 10 Am. Dec. 609; *Duren* v. *Sinclair*, 22 S. C. 361-366; *Love* v. *Turner*, 78 S. C. 513-519, 59 S. E. 529. * * *"

In the case of *Lewis* v. *Pope*, 86 S. C. 285, 68 S. E. 680, 683, the following statement was specifically approved:

"He cannot succeed in such claim (of adverse possession) by living on another tract and cultivating for a few years a small patch on the tract he claims, or by going on such tract and sometimes cutting wood or timber, and hauling it off for use on the tract on which he lives, but he must show that he has been doing that for 10 consecutive years."

From an exhaustive analysis of the authorities in *Weston* v. *Morgan*, 162 S. C. 177, 160 S. E. 436, at p. 445, the following summary may be quoted:

"A plaintiff claiming title by adverse possession must show the extent of his possession. *Cantey* v. *Platt*, 2 McCord, 260.

"The burden of the proof of adverse possession is on the one relying thereon. *Gourdine* v. *Fludd*, Harp. 232.

"Occasional and temporary use or occupation does not constitute adverse possession. *A. C. L. R. Co.* v. *Searson*, 137 S. C. 468, 135 S. E. 567.

* * * * * * *

"And to constitute adverse possession it must be open, notorious, exclusive, hostile, continuous, and unbroken for the whole period. *Hill* v. *Saunders*, 6 Rich. 62; *Ouzts* v. *McKnight*, 114 S. E. 303, 103 S. E. 561; *Clary* v. *Bonnett*, 114 S. C. 459, 103 S. E. 779; 1 R. C. L. 700-716.

"Successive possessions for less than the statutory period cannot be tacked, unless by descent cast. *King* [fol. 195] v. *Smith*, Rice, 10; *Porter* v. *Kennedy*, 1 McMul. 354; *Garrett* v. *Weinberg*, 48 S. C. 28, 26 S. E. 3.

"Occasional or temporary use or occupation is not sufficient. *Jackson* v. *Lewis*, Cheves, 259; *McCullough* v. *Wall*, 4 Rich. 68, 53 Am. Dec. 715."

And further, with reference to the necessity of establishing continuity of such adverse possession, the following statement is taken from *Cathcart* v. *Matthews*, 105 S. C. 329, 89 S. E. 1021, at page 1025:

> "It has been said that, if there be one element more distinctly material than another in conferring title by adverse possession, where all requisites are so, it is the existence of a continuous adverse possession. There must be such continuity of possession as will furnish a cause of action for every day during the whole period required to perfect title by adverse possession." 2 Corpus Juris, 82; *Porter* v. *Kennedy*, v *McMul.* 354; *Hill* v. *Saunders*, 6 Rich. 62; *Massey* v. *Duren*, 3 S. C. 34."

From all the foregoing, it seems obvious that the plaintiff here has failed to establish such possession, actual or constructive, as to establish his title to the property. Having failed to establish title, his action must fail unless his proof shows him to have been in possession at the time of the trespass.

It follows of necessity that the inadequacies of plaintiff's proof of prior possession become even more glaring if they are to be interpreted as proof of present possession. Especially is this so if this proof is considered in the light of the defendant's proof offered to establish its own actual possession, since its purchase of the property in 1924. In brief, this proof of the defendant showed the cutting of an extensive fire line by the CCC on behalf of the Paper Com- [fol. 196] pany; the regular maintenance and clearance of this line by Company agents, the regular posting of the property by the Paper Company, entry upon the property to guard against poachers and fire hazards at intervals of about once a week by an agent of the Company, and finally the entry (herein complained of) when the bulk of the timber on the property was cut. It is difficult to see that defendant could have done much more to assert its possession.

The following statement of the acts of ownership or possession required as to lands such as this tract is taken from *D. W. Alderman & Sons Co.* v. *McKnight*, 95 S. C. 245, 78 S. E. 982, 986:

> "On the question of adverse possession my concep-

tion of the law is that the law is not as strict or as jealous as to what constitutes acts of adverse possession with regard to open, wild, unfenced, and uncultivated lands, or lands that are not capable of cultivation, as it would be with regard to lands that are capable of cultivation, or which are situated in some time capable of having the highest acts of possession exercised with regard to them; but that acts of adverse possession, or acts of ownership, with regard to open, wild, unfenced lands, lands not capable of cultivation, are only required to be exercised in such way and in such manner as is consistent with the use to which the lands may be put and the situation of the property admits of without actual residence or occupancy."

The plaintiff makes much of the point that he paid taxes on the property, whereas such payment by the Paper Company was not clearly shown. The South Carolina law on this point has been expressed in the statement: "The payment of taxes is not evidence of title as is supposed in [fol. 197] popular myth, but the failure to pay is evidence that no claim was made." *Gadsden* v. *West Shore Investment Co.*, 99 S. C. 172, 82 S. E. 1052, 1053. But in applying this rule to the instant case, it must be remembered that the state of the proof was merely that payment by the Paper Company was not conclusively established for all years of ownership. Defendant did allege such payment by a subsidiary company, the Cooper River Timber Company, for the intervening years.

It is most unfortunate that the system of keeping the land records for taxation in this region was such that it is almost entirely impossible to determine with any measure of certainty just what parcel or parcels of land were covered by a particular tax payment. The inadequacies of this system also account for the otherwise curious fact that the State would accept, without inquiry, an unlimited number of duplicate payments of taxes by different parties on the same tract of land for the same year. In such a state of the records, it does not appear that material reliance by either party upon payment of taxes is really justifiable.

In the foregoing portions of this opinion we have set forth our views of the facts as they were presented at the trial, along with the related comments on the apposite law, as we see it. Before summarizing our conclusions, it must

be stated that the defendant took numerous exceptions to the introduction of certain evidence, to some of which reference has already been made, and moved for a directed verdict at the conclusion of the entire testimony. This motion was denied and the jury returned a verdict for the plaintiff, setting the damages at $15,000. The defendant moved for a new trial and later renewed this motion upon the basis of newly-discovered evidence. Following [fol. 198] judgment for plaintiff after the denial of these motions, the case was brought here on appeal.

On its appeal, the defendant argues that the judgment below should be reversed in consequence of the plaintiff's failure to establish either title or possession and the defendant's establishment of both title and possession, because of prejudicial error in the admission of testimony as to the plaintiff's back title, because of the denial of the motion for a new trial on the basis of after-discovered evidence, and also because of a contention not previously noted here, namely, that the trespass complained of was not committed by the defendant. Our views with respect to several of these grounds have already been indicated, at least in part.

Specifically, we have already indicated our opinion that prejudicial error occurred in the admission of evidence with reference to the plaintiff's alleged predecessor in title. This ground alone is sufficient to require a remand of the case for a new trial, so that it is unnecessary for us to consider whether the denial of defendant's motion for a new trial upon after-discovered evidence was error. The defendant's final contention, that since the actual cutting of the timber was done by another company, no liability was shown as to it, seems to us without merit. It is conceded that the other company entered under authority of a timber deed from the Paper Company, acted on its behalf, and was directly supervised in its actions by the Paper Company's agents. One may not escape civil responsibility for a trespass merely by hiring some one else to do the physical labor involved, under one's own immediate supervision. Accordingly, we reject this basis of the defendant's appeal.

This leaves only the question as to whether or [fol. 199] not the plaintiff has established sufficient possession, actual or constructive, to justify him in maintaining this action. Since the defendant has also undertaken to show its own actual possession, it is in order to consider

the legal status of two conflicting claims of possession at the same time. The following quotation from the old case of *Vance* v. *Beatty*, 4 Rich. 104, has recently been reaffirmed by the South Carolina Supreme Court in *Littleton* v. *Roberts*, 181 S. C. 303, 187 S. E. 349, 351.

> "For a casual trespass, one resting on his title alone may maintain this action, because trespassers of this description acquire no possession and have nothing to oppose. But where the defendant is in actual possession the case is different; for, as is said in *Amick* v. *Frazier*, (Dud. 340) it would be a 'solecism to say that one can have a constructive possession of that which is in the actual possession of another.' In this contest between actual and constructive possession the latter has always been made to yield, or, as was said in the recent case of *McColman* v. *Wilkes*, (3 Strob. 465 (51 Am. Dec. 637)) 'it is always displaced by any actual possession;' and in the case of *Davis* v. *Clancy & Johnson*, and *Peareson* v. *Danby & Nelson*, already referred to for other purposes, the same principle is fully maintained."

On the basis of the foregoing authority and in the light of at least substantial proof of actual possession by the defendant, it would appear that plaintiff should be required to establish actual, rather than constructive, possession, in order to maintain his action. It might be contended that the jury's verdict for plaintiff has established such possession. But such is not the case where improper evidence was before the jury as to plaintiff's title, so that the general verdict may just [fol. 200] as well have been based upon the jury's conception that plaintiff had title as that he had possession.

From the foregoing analysis, it is definitely established that the judgment below cannot stand. This leaves to be determined the question of whether the case shall be remanded for a new trial or reversed outright on the basis of error in denying defendant's motion for a directed verdict. Since we have determined that the plaintiff did not prove title, this question must turn on whether or not there was sufficient evidence of plaintiff's possession to go to the jury. The facts

that plaintiff paid taxes on the land and that his father gave someone else permission to hunt on the land are matters whose sole probative force is directed to plaintiff's title, not his possession, so that these may be rejected here.

This leaves only two facts: first, plaintiff's testimony of sporadic hunting on the land, concededly not every year and apparently of such limited scope that he never saw the Paper Company's posted signs nor the fire line cut six years before the trespass here complained of; and, second, the cutting of some fallen timber for clapboard at an indefinite time, apparently about eighteen years before the alleged trespass. And even these slender crutches must be evaluated in the light of plaintiff's statement that, after he moved away in 1923, he "didn't do nothing" concerning the property, and the fact that upon his discovery of the timber cutting he made no open protest or complaint of any kind, variety or description.

We cannot convince ourselves that such proof establishes possession, however charitably it may be viewed. If possession was not established, the judge erred in deny-
[fols. 201-202] ing defendant's motion for a directed verdict. We find that possession was not established by any evidence worthy of submission to the jury. The judgment of the lower court is accordingly reversed with direction to enter judgment for the defendant.

Though no motion for judgment notwithstanding the verdict (*non obstante veredicto*) was made in the lower court by the defendant, we think, on the strength of the reasons discussed and the authorities cited in *United States* v. *Halliday* (C. C. A. 4), 116 F. (2d) 812, we have power, (under Rule 50(b) of the Federal Rules of Civil Procedure) instead of ordering a new trial, to direct the entry of judgment by the lower court in favor of the defendant. See, also Dobie, The Revision of the Federal Rules of Civil Procedure, 30 Va. L. Rev. 513, 521.

Reversed.

[fol. 203] UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT

No. 5442

WEST VIRGINIA PULP & PAPER COMPANY, a Corporation, Appellant,

vs.

A. N. CONE, Appellee

Appeal from the District Court of the United States for the Eastern District of South Carolina

JUDGMENT—Filed and Entered February 7, 1946

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of South Carolina, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Eastern District of South Carolina, at Charleston, with directions to set aside the verdict and enter a judgment for the defendant in accordance with the opinion of the Court filed herein.

Morris A. Soper, U. S. Circuit Judge. Armistead M. Dobie, U. S. Circuit Judge. Don Gilliam, U. S. District Judge.

[fol. 203a] Petition for rehearing covering 9 pages filed March 4, 1946 omitted from this print. It was denied, and nothing more by order dated March 15, 1946.

[fols. 204-214] Petition for rehearing covering—pages filed omitted from this print. It was denied, and nothing more by order.

[fols. 215-217] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

ORDER DENYING REHEARING—Filed March 15, 1946

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston

This Court having at its January term, 1946, rendered its decision reversing the judgment of the said District Court appealed from, in this cause, and the appellee having on March 4, 1946, presented to the Court a petition for a rehearing of the said cause, and the same having been carefully considered,

It Is Now Here Ordered by This Court that the rehearing asked for, be, and the same is hereby, denied. Let mandate issue after the expiration of five days.

Morris A. Soper, U. S. Circuit Judge; Armistead M. Dobie, U. S. Circuit Judge; Don Gilliam, U. S. District Judge.

On another day, to-wit, March 21, 1946, the mandate of this Court, in this cause, is issued and transmitted to the District Court of the United States for the Eastern District of South Carolina, at Charleston, in due form.

Same day, the original exhibits are returned to the Clerk of the U. S. District Court at Charleston, S. C.

[fol. 218] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 184

A. N. CONE, Petitioner,

vs.

WEST VIRGINIA PULP AND PAPER CO.

ORDER ALLOWING CERTIORARI—Filed October 14, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted, limited to the questions of federal procedure raised by the petition for the writ.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 219] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1946.

No. 184

A. N. CONE, Petitioner,

VERSUS

WEST VIRGINIA PULP & PAPER COMPANY, a Corporation, Respondent.

STIPULATION —Filed November 23, 1946.

Subject to this court's approval, it is hereby stipulated and agreed, by and between Counsel for the respective parties hereto, that under the writ of certiorari in the above entitled case the printed record may consist of the following:

1. Appendix to appellant's brief in the United States Circuit Court of Appeals for the Fourth Circuit.
2. Appendix to appellee's brief in the United States Circuit Court of Appeals for the Fourth Circuit.
3. The proceedings had before the United States Circuit Court of Appeals for the Fourth Circuit.

It is further stipulated and agreed that either of the parties hereto may refer in his brief to the record filed in the Supreme Court of the United States.

Counsel for respondent contend that, under the order limiting certiorari in this case, the evidence and the exhibits introduced on the trial in the District Court and the record of the motion for a new trial on the ground of after-discovered evidence made in said Court, together with the opinion and order of the District Court thereon, are irrelevant to the questions to be reviewed and should be omitted from the record to be printed for the Supreme Court. This was provided in a stipulation suggested by counsel for respondent but consent thereto was refused by counsel for petitioner. Counsel for respondent, therefore, sign this stipulation only because of the assurance and insistence of counsel for petitioner that he must have this stipulation before the Clerk will print the record as counsel for petitioner desire and have designated, including the portions above contended to be irrelevant.

Counsel for respondent reserve the right to contend on the argument that the portions of the record above referred to are irrelevant to the questions of federal procedure raised by the petition for the writ.

Charles W. Waring, Christie Benet, Counsel for Respondent. H. Wayne Unger, J. P. Mozingo, W. J. McLeod, Jr., Counsel for Petitioner.

November 18, 1946.

(8053)